Petition

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ALEXANDER L. STEVAS,
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether an 18-month delay between the time the Customs Service seizes a claimant's money (for failure to declare it, in violation of 31 U.S.C. 1101) and the time the United States Attorney files a civil forfeiture action in federal court constitutes, in the absence of any prejudice to claimant's case, a violation of her Fifth Amendment right to due process.

2. Whether the government's delay in filing a civil forfeiture action can be justified because the claimant has filed an administrative petition for remission or mitigation with the Secretary of the Treasury which is being investigated and which, if granted, can supply the claimant with a complete remedy for the seizure of her money.

3. Whether, assuming that delay alone violates a claimant's right to due process, dismissal of the civil forfeiture action brought by the United States is the appropriate remedy.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 645 F.2d 836. The district court's findings of fact and conclusions of law (App. C, *infra*, 14a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981,[1] and a petition for rehearing was denied on August 21, 1981 (App. B, *infra*,

[1] No judgment appears in the appendix because the Ninth Circuit does not reduce the judgment to writing until it issues the mandate to the district court. The court of appeals, however, has stayed the mandate pending the filing of this petition. Therefore, there is no separate written judgment at this time.

13a). On November 12, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 11, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

19 U.S.C. 1602 provides in pertinent part:

> It shall be the duty of any officer, agent, or other person authorized by law to make seizures of merchandise or baggage subject to seizure for violation of the customs laws, to report every such seizure immediately to the appropriate customs officer for the district in which such violation occurred * * * and to report immediately to such customs officer every violation of the customs laws.

19 U.S.C. (Supp. III) 1603 provides:

> Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs law is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation

to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. 1604 provides in pertinent part:

> It shall be the duty of every United States attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture * * *.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

STATEMENT

1. Under 31 U.S.C. 1101(a), anyone who "knowingly transports * * * monetary instruments * * * to any place within the United States from or through any place outside the United States * * * in an amount exceeding $5,000 on any one occasion shall file a report" with the Customs Service declaring, *inter alia*, the amount being transported. The following section of the Code (31 U.S.C. 1102(a)) empowers the United States to seize and forfeit "[a]ny monetary instruments * * * with respect to which any report required to be filed * * * has not been filed * * *." Forfeiture is therefore permissible without any showing of intent or willfulness to violate the reporting requirements.[2]

Once the property is seized, the responsible Customs agent has a statutory obligation to report the seizure "immediately" to "the appropriate customs officer for the district in which such violation occurred (19 U.S.C. 1602). Any person who appears to have an interest in the seized property is given written notice by the officer (19 C.F.R. 162.31(a)) of the property's liability to forfeiture and of the right to petition the Secretary of the Treasury for remission or mitigation of the forfeiture under 19 U.S.C. 1618. That section provides that the Secretary may remit or mitigate a forfeiture, upon the claimant's petition, if he finds that it was incurred "without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the

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[2] The individual must be aware that he is carrying the money, but the facts in this case are uncontroverted on that issue. The requirements of Section 1102 stand in contradistinction to those for civil or criminal penalties under 31 U.S.C. 1056 and 1058, which require a "willful" violation of the reporting requirements.

law," or if he finds other mitigating circumstances. A petition for such relief must be filed within 60 days from the date the notice of forfeiture was mailed (19 C.F.R. 171.12(b)). If the petitioner is not satisfied with the decision of the Secretary, he may file a supplemental petition within 60 days of the decision (19 C.F.R. 171.33(a)(1)).

If no petition is filed, or if, after consideration and decision on a petition, it appears that legal proceedings in connection with the seizure are necessary, the appropriate customs officer, after appraising the merchandise (19 U.S.C. 1606; 19 C.F.R. 162.43), must prepare a full report of the seizure for the United States Attorney, giving all the relevant facts and circumstances (19 U.S.C. 1603; 19 C.F.R. 162.43).[3] At the time of the seizure in this case, there was no statutory requirement as to how quickly the Customs Officer should prepare his report to the United States Attorney. Congress subsequently amended the statute to require the customs officer to act "promptly." Act of Oct. 3, 1978, Pub. L. No. 95-410, Section 110(b), 92 Stat. 897, 19 U.S.C. (Supp. III) 1603.

Upon receipt of a report, the United States Attorney is required "immediately to inquire into the facts" and, if it appears probable that a forfeiture has been incurred, "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay" (19 U.S.C. 1604). After a case is reported

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[3] At the time of the seizure in this case, the statute provided that if the value of the seized merchandise was not more than $2,500, the customs officer could institute non-judicial, summary forfeiture proceedings. See 19 U.S.C. 1607-1609; 19 C.F.R. 162.45-162.48 (1975). The limit has now been raised to $10,000. Act of Oct. 3, 1978, Pub. L. No. 95-410, Section 111(a), 92 Stat. 897, 19 U.S.C. (Supp. III) 1607.

to the United States Attorney for institution of legal proceedings, no administrative action may be taken on any petition for remission or mitigation. 19 C.F.R. 171.2(a).

The statute thus expressly imposes immediacy requirements on the officer who effects the seizure and on the United States Attorney who prosecutes the case, but it requires only "prompt" action with respect to the interim period, which is reserved for administrative consideration of petitions for remission or mitigation, appraisement of the seized merchandise, determination of whether judicial proceedings are required, and preparation of a report for the United States Attorney.[4]

2. On September 10, 1975, claimant Vasquez flew from Canada to Los Angeles (App. C, *infra*, 15a). After landing, she presented her Customs Baggage Declaration to a Customs inspector. On that form is the question: "Are you or anyone in your party carrying over $5,000 in coin, currency, or monetary instruments," which she answered by checking the "No" box. The inspector asked claimant three times whether she or anyone in her party was carrying more than $5,000 in United States currency and claimant responded in the negative all three times (*id.* at 15a-16a).[5]

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[4] There is, in addition, a general statute of limitations requiring that any suit to recover a penalty of forfeiture under the customs laws be commenced within five years from the time the offense was discovered (19 U.S.C. (Supp. III) 1621).

[5] The Customs area in which claimant was inspected contains large color posters that state (App. C, *infra*, 16a-17a):

> If you transport, mail, ship, or receive more than $5,000 in currency of the United States or any other country, or monetary instruments (such as traveler's checks,

A second Customs inspector observed that claimant had an unusual bulge on the right side of her upper torso (Tr. 31).[6] In addition, he recognized claimant's name from a computerized list of persons suspected of involvement in narcotics trafficking (Tr. 32). He therefore arranged for a female inspector to continue the examination by a pat-down of claimant in a private room (App. C, *infra*, 16a). As a result of this search, an envelope containing currency was discovered in claimant's longline bra. The female inspector counted the money in claimant's presence and told her that she counted $9,850. Claimant responded that it was "not that much" (Tr. 103-104) and, in fact, the envelope contained only $8,850, in $100 and $50 bills (App. C, *infra*, 16a).

On September 18, 1975, Customs sent a letter to claimant informing her officially that the seized currency was subject to forfeiture because of her failure to report it, in violation of 31 U.S.C. 1101. The letter also informed her that she had the right to petition

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negotiable instruments in bearer form, or money orders) into or out of the United States, you must file a report with U.S. Customs. Ask a Customs officer for the currency report form. Failure to report can result in forfeiture of the monies and civil and criminal penalties (31 USC 1101 et seq.).

Several of these posters are prominently displayed above the baggage belts where passengers wait to claim their baggage prior to Customs examination. Additionally, these same color posters are displayed at eye level in the area where passengers wait to be processed by the Immigration and Naturalization Service (App. C, *infra*, 17a).

[6] "Tr." refers to the transcript of the civil forfeiture hearing held before the district court on January 17 and 18, 1978. "R." refers to the Clerk's Record on Appeal that was filed with the court of appeals.

the District Director of Customs for remission or mitigation of the forfeiture in accordance with 19 U.S.C. 1618 (R. 57). Claimant, through her attorney,[7] filed a petition for remission or mitigation on September 25, 1975. The petition stated that claimant's violation of the law was unintentional insofar as she mistakenly believed that she was only required to declare funds that had been obtained in another country (R. 58-59).

On October 20, 1975, the Customs Office of Investigation assigned a special agent to investigate the petition for remission or mitigation (Tr. 48; App. C, *infra*, 17a). Within a few days, the agent had interviewed the customs inspectors who were involved in the seizure of the currency at the Los Angeles International Airport (Tr. 48, 74). She then attempted to contact claimant's attorney to arrange an interview with claimant. She finally succeeded in contacting him on November 13, 1975, and again sought to arrange an interview, but counsel was too busy to meet with the agent at that time and he wanted to be present when the agent interviewed his client (Tr. 50-51; App. C, *infra*, 17a).

Thereafter, neither party made any attempt to contact the other until March 2, 1976, when the special agent again telephoned claimant's attorney. He returned her call two days later and told her that she could interview his client if the agent were

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[7] Claimant's attorney previously had informed Customs that claimant had assigned her rights in the seized property to him. Much later, after the government challenged claimant's standing to seek return of the currency, counsel informed the district court that he had released his interest in the currency "other than as to any private agreement he may have with the claimant" (R. 92, 141, 148).

willing to come to Los Angeles. She agreed and the interview took place the following day (Tr. 62-63, 87-89; R. 110).

On March 29, 1976, claimant submitted the affidavit of John Walters (R. 62-64). According to the affidavit, Walters gave claimant the money so that she could buy some Canadian property jointly with him. This was the first innocent explanation offered by claimant for her possession of $8,850 while entering the United States.[8] On April 26, 1976, claimant also for the first time (R. 65) expressed a desire for expedition of the administrative decision on the petition for remission.

3. In the meantime, the special agent also pursued inquiries with various law enforcement agencies to determine whether the seized currency was part of a narcotics transaction.[9] The special agent drafted a preliminary report to the United States Attorney's Office in late November 1975. Her supervisor told her, however, not to forward the report until she had interviewed claimant and received responses to her inquiries from the other law enforcement agen-

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[8] Nor did claimant request that the currency be placed in an interest bearing account (R. 112). The money was placed in such an account only after the case was on appeal.

[9] The agent opened a seperate criminal file on the case in early November 1975 (Tr. 48-49). She knew that claimant's family was involved in extensive heroin dealing activities. Claimant had a long record of arrests for narcotics violations but only one conviction (Tr. 53-54; R. 89). The agent treated the case carefully because she recognized (Tr. 54) that a currency reporting violation is normally a misdemeanor but that a reporting violation committed in furtherance of any other violation of federal law is a felony. Compare 31 U.S.C. 1058 with 31 U.S.C. 1059. She thus considered it important to ascertain whether or not claimant's reporting violation occurred in the context of a broader criminal scheme.

cies, including the Royal Canadian Mounted Police. She was in contact with these agencies "quite a few times" during this period, but did not receive final reports from them until April 1976 (Tr. 54-56). The other law enforcement agencies could not provide information showing that the currency violation was part of an ongoing criminal activity (App. C, *infra*, 18a).

The agent then prepared a final draft of her criminal report, as well as a report on the forfeiture action (R. 110). After the criminal report was typed and reviewed by her supervisor, it was sent to the United States Attorney's Office on May 17, 1976 (*ibid.*). On June 9, 1976, an Assistant United States Attorney requested the agent to reinterview the customs witnesses in the case. She did that and reported her findings on June 10 and 11, 1976 (R. 110-111). On June 15, 1976, she presented the government's criminal case to the grand jury which returned an indictment the same day charging claimant with knowingly and willfully making false statements to a United States customs officer, in violation of 18 U.S.C. 1001, and with knowingly and willfully transporting $8,850 into the United States without filing a report, in violation of 31 U.S.C. 1058 and 1101 (App. C, *infra*, 18a).

On August 19, 1976, the agent informed the District Director that the currency would be used as evidence in the criminal trial. Accordingly, she requested disposition of the petition to be withheld until after the currency was no longer needed as evidence (R. 111).

4. The criminal trial did not commence until December 14, 1976 (R. 111).[10] The jury returned its

[10] The only indication in the record as to why the criminal trial was delayed as long as it was is the fact that on No-

verdicts on December 24, 1976. It found claimant guilty on the felony count of making a false statement, but acquitted her on the misdemeanor charge of willfully failing to file a currency report (App. C, infra, 17a).[11]

On December 28, 1976, claimant informed the special agent of the jury's verdicts and again requested expedition of the District Director's decision on the petition for remission or mitigation (R. 66). On March 10, 1977, the District Director notified claimant that the Customs Service's forfeiture claim had been referred to the United States Attorney for further action (R. 67).[12]

5. The complaint for forfeiture was filed in the United States District Court for the Central District of California on March 22, 1977. It simply alleged that claimant had transported the defendant currency into the United States on September 10, 1975, without making the report required by 31 U.S.C. 1101 and 31 C.F.R. 103.23(a) and 103.25, and that the currency was accordingly subject to forfeiture under the provisions of 31 U.S.C. 1102 and 31 C.F.R. 103.48 (R. 1-2).

In her answer to the complaint, filed on April 27, 1977, claimant admitted the truth of the government's factual allegations (R. 9) but asserted numerous constitutional and other legal defenses. Claim-

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vember 11, 1976, claimant's attorney requested a continuance of the trial date until December 14 because he had "not completed his pretrial investigation" (*ibid.*).

[11] The conviction on the felony count was subsequently reversed because court files were left in the jury room during deliberation. *United States* v. *Vasquez*, 597 F.2d 192 (9th Cir. 1979).

[12] On March 28, 1977, claimant was formally notified that the petition for remission had been denied (R. 68).

ant's "eighth affirmative defense" was that the government's "dilatory processing" of her petition for remission or mitigation and "dilatory" commencement of the civil forfeiture action violated her right to due process (R. 12). Subsequently, claimant filed a motion for summary judgment (R. 27-55) arguing, *inter alia*, that the government's delay in passing upon the petition for remission and in instituting the forfeiture action was unreasonable and that such delay violated claimant's right to due process. The summary judgment motion was denied on August 18, 1977 (R. 149-151).

The civil forfeiture trial took place on January 17 and 18, 1978. Counsel stipulated to all of the facts set forth above concerning the events at the Los Angeles airport on September 10, 1975 (Tr. 102-104). The only real issue litigated at the trial was the government's delay (Tr. 26). The district court stated at the hearing: "[I]n view of the evidence here, I just cannot see any way in which this Court can say that the government has not pursued their claim in all reasonable diligence" (Tr. 98). The court then found that the currency was subject to forfeiture under 31 U.S.C. 1102 (App. C, *infra*, 19a).[13]

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[13] The court noted (*ibid.*) that claimant's acquittal on the criminal charge under 31 U.S.C. 1058 and 1101 did not collaterally estop the government from seeking forfeiture of the currency because the two actions involved different factual elements and burdens of proof. See *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972).

In order to establish a criminal violation of the currency reporting requirement, the government must prove that defendant had knowledge of the requirement and acted willfully in disregard of it. *E.g.*, *United States* v. *Granda*, 565 F.2d 922 (5th Cir. 1978). Intent need not be proved in a civil forfeiture action under 31 U.S.C. 1102.

6. A divided panel of the Ninth Circuit reversed the district court (App. A, *infra*, 1a-12a). The majority first held that the pendency of the administrative and criminal proceedings could not justify the government's delay in filing the civil forfeiture action "when the necessary elements for a forfeiture were established at the time of the seizure and when * * * [claimant's attorney] repeatedly sought to have the claim of his client speedily resolved" (App. A, *infra*, 4a).

The majority also rejected the government's argument that claimant was, in any event, not prejudiced by the delay. In its view, prejudice was "simply not relevant" in determining whether a due process violation had occurred (App. A, *infra*, 6a). While not specifically addressing itself to the question of remedies, the majority held that "[t]he claimant need only show unjustified delay in order to bar a judgment of forfeiture" (*id.* at 5a).

Judge Alarcon dissented (App. A, infra, 8a-12a). In his view, in order to establish a violation of due process, the claimant must show unreasonable delay and prejudice resulting from that delay (*id.* at 10a). Since the claimant's ability to defend the civil forfeiture action had not been diminished by the delay, he would have held that there was no due process violation (*id.* at 11a-12a).

REASONS FOR GRANTING THE PETITION

The issue of how much time after a seizure of property the government has before it must file a civil forfeiture action in federal court is an important one that has arisen frequently and received inconsistent treatment by various courts of appeals. The decision of the court of appeals in this case in-

flexibly declares the Due Process Clause violated solely because of delay and denies the United States its statutory entitlement to forfeit this property. The decision conflicts in principle with decisions of this Court and other courts of appeals and has needlessly compromised the government's use of civil forfeiture as an integral part of its efforts to enforce the criminal laws.[14] It is therefore appropriate for this Court to consider these issues now in order to resolve the judicial inconsistencies and end the continuing uncertainty as to what the Constitution requires in this context.

1. The court of appeals decided (App. A, *infra*, 5a-7a) that no allegation of prejudice from the delay in processing claimant's case—either through injury to the property seized or to the claimant's ability to defend against the forfeiture—was required in order to state a due process violation. Although this Court has never dealt specifically with the timeliness requirements of due process in a post-seizure, civil forfeiture case involving currency,[15] it has discussed the

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[14] "Enforcement officers of the Government have found that one of the best ways to strike at commercialized crime is through the pocketbooks of the criminals who engage in it." H.R. Rep. No. 2751, 81st Cong., 2d Sess. 3 (1950). See also *Berkowitz* v. *United States*, 340 F.2d 168, 170 (1st Cir. 1965); Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 Wm. & Mary L. Rev. 661, 662 (1978).

[15] The Court has decided cases in related areas. In *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363 (1971), the Court reviewed the procedures of the Customs Service in seizing allegedly obscene objects that were imported into the country. Relying upon prior decisions which required prompt governmental action when dealing with prior restraints of protected First Amendment activity (*Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968); *Freedman* v. *Maryland*, 380 U.S. 51 (1965)),

issue of delay in other contexts and found the absence of prejudice to be a conclusive factor. See *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977); *United States* v. *Marion*, 404 U.S. 307 (1971). See also *Parratt* v. *Taylor*, No. 79-1734 (May 18, 1981), slip op. 11-13; *Barker* v. *Wingo*, 407 U.S. 514, 532 (1972).[16]

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the Court read into the Customs statute a requirement that a judicial forfeiture proceeding for allegedly obscene material be commenced within 14 days and completed no more than 60 days later. The Court did note the statutory scheme at issue in this case (19 U.S.C. 1602-1604) and found that those provisions did not cure the constitutional infirmity because of their lack of specific time limits. *United States* v. *Thirty-Seven (37) Photographs*, *supra*, 402 U.S. at 368 n.2. The extent to which the lessons of that case extend to forfeiture of non-First-Amendment-protected property has been a matter of some dispute between the courts of appeals. Compare, *e.g.*, *Sarkisian* v. *United States*, 472 F.2d 468, 470 (10th Cir.), cert. denied, 414 U.S. 976 (1973) with *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, 530 F.2d 672, 676 n.7 (5th Cir. 1976).

In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974), this Court held that the government's paramount interest in "preventing continued illicit use of the property and * * * enforcing criminal sanctions" and in protecting its jurisdiction required that the government be allowed to seize property without a prior hearing. The Court thus recognized the significant governmental interest involved in forfeiture proceedings, but was not required to consider what post-seizure process was required by the Constitution. *Id.* at 680 n.15.

[16] As this Court recognized in a not wholly unrelated context, "mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate." *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597 (1931). See also *Parratt* v. *Taylor*, *supra*, slip op. 11-13. There is no question that the judicial process of the civil forfeiture action, itself, is fully adequate to satisfy due process.

In addition to the inconsistency between the decision in this case and general constitutional principles previously announced by this Court, the Ninth Circuit's decision also conflicts directly with reasoning of other courts of appeals in civil forfeiture cases. The Court of Appeals for the Eighth Circuit has concluded "that the mere lapse of time between seizure * * * and commencement of the instant forfeiture action did not prejudicially violate appellee's due process rights." *United States* v. *Various Pieces of Semiconductor Manufacturing Equipment*, 649 F.2d 606, 607 (1981).[17] See also *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977). In so holding the court recognized that its view was in accord with the Fifth Circuit because the latter court had affirmed by order a district court decision holding that an 18-month delay did not violate the claimant's due process rights. *United States* v. *Thirty-Six Thousand One Hundred &*

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[17] Although the absence of prejudice in the Eighth Circuit's case was unusually clear in light of the claimant's open admission that the property was subject to forfeiture, *United States* v. *Various Pieces of Semiconductor Manufacturing Equipment, supra*, 649 F.2d at 607, that admission does not distinguish this case. The facts in this case also were stipulated, and there is no factual basis for denying the government this forfeiture. Claimant's only factual assertion throughout the entire process was that she lacked intent to violate the law. See 19 U.S.C. 1618. Intent is not, however, a prerequisite to civil forfeiture. The inadequacy of claimant's defense to the civil forfeiture suit is best demonstrated by the fact that, although her counsel twice requested expedition of the administrative process, he never attempted to move the case expeditiously to the court.

Twenty-Five Dollars ($36,125.00) in U.S. Currency, 642 F.2d 1211 (5th Cir. 1981), aff'g 510 F. Supp. 303 (E.D. La. 1980). Prior to that decision the Fifth Circuit also had had no difficulty rejecting a claimant's assertion that an eleven-month delay violated the Constitution. See *United States* v. *One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY*, 501 F.2d 1327 (5th Cir. 1974).

Indeed, the government had reason to believe that the Ninth Circuit itself had adopted a similar requirement just three years ago in *Ivers* v. *United States*, 581 F.2d 1362 (1978). In that case the court listed as an "additional consideration" in rejecting the claimant's assertion that delay violated his rights, "the apparent absence of any prejudice to [claimant] flowing from the challenged delay. He has not shown any respect in which his defense to forfeiture was impaired by the passage of time." *Id.* at 1373. The Ninth Circuit in this case dismissed that comment as "mere dicta" (App. A, *infra*, 6a), provoking Judge Alarcon in dissent to lament that the majority had overruled *Ivers* "*sub silentio* without a decent or public burial" (id. at 8a).[18]

The rule in other circuits is difficult to state with confidence. For instance, the Tenth Circuit decided one of the first in this line of cases against the gov-

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[18] The governmnet sought to have this inconsistency between the panels resolved by filing a petition for rehearing with a suggestion for rehearing en banc, but it was denied (App. B, *infra*, 13a). Thus, not only is there an inter-circuit inconsistency on this issue, but the government is left to guess as to what rule will be applied in a particular case within the Ninth Circuit.

ernment in *Sarkisian* v. *United States*, 472 F.2d 468, cert. denied, 414 U.S. 976 (1973). Relying heavily upon this Court's then-recent decision in *United States* v. *Thirty-Seven* (*37*) *Photographs*, *supra*, the Tenth Circuit held that a 14-month delay violated due process. Of particular significance to the court, however, was the nine-month delay after the petition for remission or mitigation was denied by the Customs Service before the United States Attorney filed a forfeiture action.[19]

Subsequently, in *White* v. *Acree*, 594 F.2d 1385 (10th Cir. 1979), the court held that an eight-month delay, part of which was the claimant's responsibility, did not violate due process. The court "reaffirmed" its holding in *Sarkisian*, but did point out that "[n]o prejudice from the delay is shown." *Id.* at 1390. Thus, it may be that "prejudice" is an

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[19] The United States filed a petition for a writ of certiorari from that decision which the Court denied. We submit, however, that the situation now has changed sufficiently that a petition in this case is appropriate. In *Sarkisian* our petition relied solely upon an alleged inconsistency with the *Thirty-Seven Photographs* decision. Now there are a significant number of appellate decisions on this question. The issue thus has been well ventilated but with an unsatisfactory inconsistency in results. In addition, the Tenth Circuit's decision in *Sarkisian* did not necessarily affect significantly the administrative process. It focused solely on post-administrative delay. The cases since *Sarkisian* have focused on the administrative delay as well and thus have created a much more difficult administrative burden on the agencies that are statutorily authorized to forfeit property. See, *e.g.*, *Von Neumann* v. *United States*, No. 79-3761 (9th Cir. Nov. 2, 1981) (one-month delay in processing administrative petition violates due process). Thus, there is a much stronger governmental interest in having this issue decided now.

element of a due process violation in civil forfeiture cases in the Tenth Circuit.[20]

It is simply impossible to reconcile the various decisions of the courts of appeals. A decision by this Court as to whether prejudice is an element of a constitutional claim is plainly warranted in order to clear the thicket of inconsistent appellate court decisions.

2. The second issue presented by the facts of this case is whether the claimant's filing of an adminis-

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[20] The First Circuit has decided only one case in this area and because of a procedural flaw in the appeal process it is very difficult to characterize its position. In *United States* v. *One Motor Yacht Named Mercury*, 527 F.2d 1112 (1975), the court affirmed a district court decision that a 12½-month delay violated the claimant's rights. But because the record had not been properly transmitted the court of appeals was unable to make a thorough review of the propriety of the district court's decision. It did state, however, that "[o]n a full record, * * * we might have been persuaded that the number of interested parties or the number of petitions presented to the Department of Justice justified the length of the administrative review." *Id.* at 1114.

Similarly, the Seventh Circuit has discussed only generally the issues in a case where a grand jury was considering whether to indict the claimant and where the district court had not made sufficient findings of fact. It is thus impossible to know its position. See *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F.2d 15 (1978).

The Fourth Circuit has held that a 16-month delay caused by "bureaucratic red tape" is by itself sufficient to violate a claimant's due process rights. See *States Marine Lines, Inc.* v. *Shultz*, 498 F.2d 1146 (1974). Unlike this case, however, that suit involved a *Bivens* action against the officials who had caused the delay. While that fact probably does not alter the basic decision as to the requisites of due process, it does supply an additional consideration in determining whether the proper remedy, assuming a violation, is dismissal of the government's claim to forfeit the property (see page 23 & note 25, *infra*).

trative petition for remission or mitigation tolls the time within which the government must file a civil forfeiture action.[21] As discussed previously, remission or mitigation is a discretionary decision left to the Secretary of the Treasury or the District Director of the Customs Service It is the claimant, however, who decides whether to file such a petition and he may withdraw the petition at any time.

Petitions in fact are filed in approximately 90% of all forfeiture cases and at least partial relief after a statutorily-required investigation is granted in the majority of cases. Through this process the government generally is able to avoid a judicial resolution of these issues, thus saving the courts time and money.[22]

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[21] The facts of this case also present an additional justification for the delay. As the district court held (App. C, *infra*, 19a):

> The result of the criminal case would be a factor that should appropriately be considered by the District Director in acting on the petition for mitigation or remission. Furthermore, the fact that the defendant currency would be evidence in the Claimant's criminal trial is a sufficient reason to suspend action on the Claimant's petition for mitigation or remission.

The Ninth Circuit, in holding that the delay was unreasonable, rejected the pendency of criminal proceedings as a justification for the delay (App. A, *infra*, 4a).

[22] The alternative to these administrative proceedings would be a premature filing of a pro forma, civil forfeiture complaint in federal court in all of these cases. The effect of such action would be to shift the decision from the administrative agency to the courts. In 1980, Customs alone had 44,063 non-narcotic seizures and in 1978, it had 61,583. U.S. Customs Service, *Customs U.S.A.* 32 (1980). It would seem to be in no one's best interest to have all of these cases handled by the court system.

Although it rejected the argument that the time for filing a civil suit should be tolled during the completion of the administrative proceeding, the Ninth Circuit in *Ivers* v. *United States*, *supra*, 581 F.2d at 1370, made a strong case for the opposite result:

> There are a number of good policy reasons why a procedural sequence in which the administrative determination precedes institution of judicial proceedings may be preferred. Administrative proceedings generally involve less formality and less cost than their judicial counterparts. Since requests for remissions of forfeitures are frequently granted, obviating any need for judicial action, unnecessary and burdensome court proceedings may be avoided by allowing the administrative process to occur first. This sequence, moreover, spares litigants the hardships which simultaneous administrative and judicial proceedings might impose, especially where, as here, a litigant is involved in defending himself against criminal charges.

In our view, these considerations are dispositive and should have led the court below, in the present case, to hold that the administrative processing of the petition justified the delay in instituting judicial proceedings.

At all events, there is also a conflict among the courts of appeals on this issue. The Tenth Circuit in *White* v. *Acree*, *supra*, 594 F.2d at 1390, expressly stated: [28]

> We hold that where parties file for administrative relief, without asking for institution of court proceedings on the legal issues, they may not

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[28] Indeed, the court in *Ivers* recognized that there was contrary authority among the courts of appeals. See *Ivers* v. *United States*, *supra*, 581 F.2d at 1371. See also App. A, *infra*, 5a.

> complain of abridgment of their rights to procedural due process during a reasonable period for investigation or until their sooner demand for forfeiture proceedings or suit brought to recover the property.

The First Circuit has taken a similar position. *United States* v. *One Motor Yacht Named Mercury*, *supra*, 527 F.2d at 1114.

In light of the importance of the administrative remedy to the government and the fact that it is the source of the bulk of the delay in civil forfeiture cases, it is appropriate for the Court to resolve the inconsistency among the courts of appeals as to whether the filing of the petition tolls the time within which the government must file a suit in federal court.

3. The Ninth Circuit, without discussion, has concluded that the appropriate remedy for delay in instituting a forfeiture action in court is dismissal of the government's suit, with the consequent loss of its entitlement to the seized property (App. A, *infra*, 8a). Although no other court of appeals has discussed the remedy issue at length (the harshness of the relief probably explains why so many courts have found no due process violation in specific cases), we believe that the issue is an important one that should be considered along with the other issues presented in this petition.

The dismissal remedy seems wholly disproportionate to the underlying wrong. See *United States* v. *Morrison*, 449 U.S. 361, 365-366 (1981); *United States* v. *Lovasco*, *supra*, 431 U.S. at 790; *United States* v. *Marion*, *supra*, 404 U.S. at 324-325. In the vast majority of the cases—as in this one—the government has on the merits a perfect right to the property. All that most claimants can assert is a right to a "prompt" hearing to remove

the final vestiges of their property interest.[24] If the government violates that right, then it is appropriate for the claimant to seek relief in the form of damages for the injury caused by the delay, which in most cases presumably will be nominal. See *Parratt* v. *Taylor*, *supra*; *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978). If the claimant truly has a meritorious claim, then the proper remedy is return of the property and interest for the time it was improperly withheld (see *Ivers* v. *United States*, *supra*, 581 F.2d at 1373; App. A, *infra*, 12a (Alarcon, J., dissenting)).[25]

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[24] At the time of the seizure for forfeiture, all rights and legal title to the property pass to the government. *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890). The judicial action simply confirms or proclaims the forfeiture that already has taken place.

[25] The United States plainly could not be sued under the Federal Tort Claims Act because there is an express exception in the Act for "[a]ny claim arising in respect of * * * the detention of any goods or merchandise by any officer of customs." 28 U.S.C. 2680(c). But injured claimants have filed *Bivens*-type actions against the individuals who caused the loss (see *Seguin* v. *Eide*, 645 F.2d 804 (9th Cir. 1981); *States Marine Lines, Inc.* v. *Shultz*, *supra*; note 20, *supra*). In addition, perhaps in a proper case, the individual could sue the United States in the Court of Claims under the Tucker Act. 28 U.S.C. 1346(a)(2). See *Simons* v. *United States*, 497 F.2d 1046, 1049 (9th Cir. 1974); *United States* v. *One 1965 Chevrolet Impala Convertible*, 475 F.2d 882, 885 (6th Cir. 1973); *United States* v. *One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1356-1357 (5th Cir. 1972).

By suggesting these alternatives, we by no means wish to indicate that we endorse any of them as necessarily appropriate, but only cite them as alternatives that have been recognized by some courts of appeals. In addition, the extreme

4. In addition to the legal problems discussed above, the decision of the court of appeals needlessly creates serious difficulties for various agencies of the federal government that are authorized to forfeit property under various statutes.[26] There are literally tens of thousands of seizures of property that could result in forfeiture actions by the federal government (see note 21, *supra*). Most of the governing statutes are like 31 U.S.C. 1102, and have no requirement that the individual intended to violate any federal law. The circumstances surrounding the seizure (in this case the money stuffed in an undergarment) typically suffice to establish the government's right to the property. Thus, in the vast majority of forfeiture situations, there is absolutely no defense on the merits to the civil forfeiture action.

In all but a handful of cases, the claimant's only prospect for reacquiring the property is that the agency will, in its discretion, allow remission or mitigation. Indeed, Customs typically grants at least partial relief. Because the administrative remedy is a matter of statutory grace and the right to forfeiture is so clear, these cases are not always disposed of by Customs as quickly as they might be. If a claimant genuinely believes that either the seizure or the forfeiture was unwarranted, however, he can file a Rule 41(e) motion for return of improperly seized property, Fed. R. Crim. P. 41(e), or he can file an

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remedy of dismissal would be appropriate in the situation where the claimant could show a significant factual issue and that the delay, through no fault of his own, injured his ability to defend the civil forfeiture action.

[26] See, *e.g.*, 16 U.S.C. 26, 65, 99, 117d, 128, 171, 198d, 204d (Department of the Interior); 21 U.S.C. 334 (FDA); 21 U.S.C. (& Supp. III) 881 (DEA); 26 U.S.C. 7302 (IRS).

equitable action requiring the government to bring the civil forfeiture action promptly or return the seized property. See *Slocum* v. *Mayberry*, 15 U.S. (2 Wheat.) 1, 9 (1817); *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, *supra*, 530 F.2d at 674-675. The fact that these actions generally are not taken is a telling indication that claimants realize that they can only rely on the administrative decision on their petitions for remission or mitigation to obtain the property.

To allow the claimant who has no legal entitlement to the property to use the delay that he easily could have avoided to justify cutting off the government's right to forfeiture gives the claimant a complete windfall. *United States* v. *One (1) 1973 Ford LTD*, 409 F. Supp. 741, 742 (D. Nev. 1976). Moreover, it probably will have the additional effect of forcing more cases into the federal courts. The administrative process, with its focus on equitable reasons for granting the petition, is inherently more time consuming than simply filing a civil forfeiture complaint. Premature filing, however, benefits no one (see note 22, *supra*). In cases where the agency continues to attempt to fulfill its statutorily-prescribed responsibilities for a thorough investigation, the Ninth Circuit and perhaps other courts of appeals (see note 20, *supra*) will dismiss the forfeiture action and the government will lose the benefit of a forfeiture that was designed by Congress as an integral part of the government's effort to enforce the criminal laws. The decision of the court of appeals thus neeedlessly creates a Hobson's choice for the United States that warrants further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1981

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. 78-2066

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS ($8,850.00) IN UNITED STATES CURRENCY, DEFENDANT

MARY JOSEPHINE VASQUEZ, CLAIMANT-APPELLANT

Argued and Submitted April 2, 1980

Decided May 22, 1981

Appeal from the United States District Court for the Central District of California

Before CHOY and ALARCON, Circuit Judges, and SOLOMON,* District Judge.

CHOY, Circuit Judge:

I. *Introduction*

Claimant Mary Josephine Vasquez (Vasquez) appeals from a judgment forfeiting $8,850 in United States currency which she failed to declare when she entered the United States. We find that the Government unjustifiably delayed institution of forfeiture proceedings in violation of Vasquez's due process

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

right. Accordingly, we reverse the judgment of forfeiture.

II. *Facts*

On September 10, 1975, Vasquez flew from Canada to Los Angeles, California. Her customs declaration stated that she was not carrying more than $5,000 in currency and she repeated this statement to a customs inspector. During a pat-down, an inspector found and seized $8,850 that Vasquez had concealed.

On September 25, 1975, Vasquez filed a petition for remission or mitigation of forfeiture. In October 1975, the petition was referred to the Office of Investigation of Customs and its investigation was assigned to Special Agent Janet Pompeo (Pompeo). Pompeo believed a criminal indictment might be warranted and in early November 1975, she opened a criminal file.

On November 13, 1975, Pompeo spoke to Vasquez's attorney, Victor Sherman (Sherman), and attempted to arrange an interview with Vasquez in San Pedro. Sherman requested that he be present at the interview. He said that he was too busy to attend an interview in San Pedro but that he would try to have Vasquez available if Pompeo would come to Los Angeles. An interview was not scheduled at that time.

Pompeo believed that Vasquez might be smuggling narcotics because in 1971 she had been arrested in a narcotics investigation. From November 1975 until April 1976, Pompeo talked with law enforcement agencies to find out whether there was a basis for a smuggling charge against Vasquez. In April 1976, Pompeo concluded that there was no evidence to support such a charge.

In January 1976, Sherman inquired about the status of the $8,850; he said that he understood a determination would be made by January 22, 1976. Shortly thereafter, Sherman was told that the investigation had not been completed and on April 16, 1976, Sherman requested that the petition either be granted or denied as soon as possible.

On May 17, 1976, Pompeo recommended prosecution and on June 15, 1976, Pompeo testified before a grand jury. Vasquez was indicted on the same day. The indictment charged Vasquez with knowingly and willfully making false statements to a United States customs officer in violation of 18 U.S.C. § 1001 and with knowingly transporting $8,850 into the United States without filing a report as required by 31 U.S.C. § 1101(b).

On December 24, 1976, Vasquez was found guilty of knowingly and willfully making false statements to a United States Customs officer[1] but the jury acquitted her on the charge of failing to declare the currency.

On December 28, 1976, Sherman notified Pompeo of the jury's verdicts and he requested that he be notified if there was to be any further delay in passing on the petition. On March 10, 1977, Sherman was notified that the claim of forfeiture had been referred to the United States Attorney's Office and within two weeks the Government filed its forfeiture action. 31 U.S.C. § 1102 and 31 C.F.R. §§ 103.23, 103.25.

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[1] Vasquez's conviction for knowingly and willfully making false statements to United States Customs officials in violation of 18 U.S.C. § 1001 was reversed and remanded because court files were left in the jury room during deliberation. *United States* v. *Vasquez*, 597 F.2d 192 (9th Cir. 1979).

III. *Discussion*

Vasquez contends that she was denied due process of law because of the Government's 18-month delay before instituting the forfeiture proceeding. We agree.

A. *The Requirement of Prompt Filing*

Forfeiture actions must be brought promptly. See *Ivers* v. *United States*, 581 F.2d 1362, 1368 (9th Cir. 1978); *United States* v. *One 1970 Ford Pickup Truck*, 564 F.2d 864 (9th Cir. 1977). Because customs seizures infringe upon the right of private ownership of property, any delay in instituting forfeiture proceedings must be justified. This requirement assumes that the citizen will be able to protest an erroneous seizure at a meaningful time. By thus limiting the potentiality for wrongful deprivation we protect property rights to the fullest extent possible, given the competing need to enforce customs laws.

In this case, the Government's 18-month delay in filing its forfeiture action was unjustified. The administrative or criminal investigations cannot justify the Government's delay when the necessary elements for a forfeiture were established at the time of the seizure and when, except for one occasion shortly after the seizure, Sherman repeatedly sought to have the claim of his client speedily resolved. The Government does not offer any other justification for delay.

Under the facts of this case we find that the Government failed to institute forfeiture proceedings in a timely manner and that such failure was not justified. *Compare United States* v. *DiRodio*, 565 F.2d 573 (9th Cir. 1977) (no due process violation where government acted diligently and where claimant's legal maneuvers produced the delay).

B. *The Elements of a Due Process Claim*

It has been suggested that Vasquez must prove, in addition to the fact of unjustified delay, that she was prejudiced by the 18-month detention of her property. It is further suggested that because currency, as opposed to a wasting asset, was detained in this case, Vasquez was not prejudiced. We find that the non-wasting character of the asset detained is not determinative of whether a due process violation has occurred. The claimant need only show unjustified delay in order to bar a judgment of forfeiture.

Earlier cases can be read to suggest that proof of prejudice is a necessary element of a due process claim. In *Ivers* v. *United States*, *supra*, this court upheld a customs forfeiture, despite tardy institution of forfeiture proceedings, because the claimant had concurred in the delay. The court also noted that the claimant offered no showing of prejudice, and that the property detained, cash, was not a wasting asset:

> A more compelling case of prejudicial delay than what has been shown here would have to be demonstrated before we would be willing to deprive the Government of a forfeiture *to which it otherwise has a legitimate entitlement. Id.* at 1373. (Emphasis added.)

In *Ivers*, delay was justified because of the claimant's own contribution to such delay. Similarly, where the claimant seeks alternative administrative relief, the Tenth Circuit has found that the Government is justified in postponing forfeiture proceedings. *See White* v. *Acree*, 594 F.2d 1385 (10th Cir. 1979). Neither *Ivers* nor *White* holds that prejudice is an

element of a due process claim. Any lack of prejudice in those cases arising from the form of the assets involved was not essential to the holdings therein. Therefore the language discussing prejudice is mere dicta.

The absence of prejudice in *Ivers* softened the harsh result of forfeiture. This may explain the inclusion of the prejudice discussion in that case. A careful analysis of the constitutional basis for the promptitude requirement, however, shows that the degree of prejudice arising from the nature of the asset is simply not relevant in determining whether due process rights attach.

Our Constitution provides that property shall not be taken without due process of law. The right to some kind of prompt judicial determination upon deprivation of property is well established. *See, e.g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975).

The constitutional basis for the law on due process claims in customs seizure cases may be stated in brief as follows:

1. Due process requires that procedural safeguards accompany government seizure of private property. *Fuentes* v. *Shevin*, 407 U.S. 67 [92 S.Ct. 1983, 32 L.Ed.2d 556] (1972).

2. In most cases, due process requires pre-seizure safeguards. *Id.* at 90-92 [92 S.Ct. at 1999-2000].

3. The exigencies involved in customs seizure cases allow a limited exception to the requirement of a pre-seizure hearing. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 [94 S.Ct. 2080, 40 L.Ed.2d 452] (1974).

4. The requirements of due process are met in customs seizure cases where the requisite proceedings are initiated promptly. *Ivers* v. *United States, supra,* at 1368.

5. Any delay in instituting forfeiture proceedings must be justified. *Id.*

To require a further showing of prejudice is inconsistent with this constitutional basis. The guiding principle is that property may not be taken without due process of law. The Supreme Court has made clear that the due process clause makes no distinction between types of property. In discussing the problem of pre-judgment garnishment, the Court has stated:

> It may be that consumers deprived of household appliances will more likely suffer irreparably than corporations deprived of bank accounts, but the probability of irreparable injury in the latter case is sufficiently great so that some procedures are necessary to guard against the risk of initial error. *We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause.* (Emphasis added.)

North Georgia Finishing, Inc. v. *Di-Chem, Inc.*, 419 U.S. 601, 608, 95 S.Ct. 719, 723 (1975).

The determinative factor in the instant case is that the Government offered no explanation for the delay. This is what distinguishes Vasquez's claim from that of the claimant in *Ivers*. The distinction between wasting and non-wasting assets may make for sympathy in a given case, but it does not change the law. Where property is seized, delay in instituting legal proceedings must be justified.

IV. *Conclusion*

A prompt hearing is constitutionally guaranteed to the owner of currency, as it is to the owner of a wasting asset. Once it is shown that the Government has detained property, cash or other, the requirement of a prompt determination attaches. Any delay must be reasonably justified. We find no reasonable justification for delay in this case.

REVERSED.

ALARCON, Circuit Judge, dissenting:

I respectfully dissent.

My colleagues have overruled *Ivers* v. *United States*, 581 F.2d 1362 (9th Cir. 1978), *sub silentio* without a decent or public burial.

Until today the law of this circuit has been that prejudice is a necessary element of a procedural due process claim based on delay. Just two years ago, this court stated, in summarizing its reasons for affirming a judgment forfeiting currency seized by the government,

> [*f*]*irst is the apparent absence of any prejudice to Ivers flowing from the challenged delay.* He has not shown any respect in which his defense to forfeiture was impaired by the passage of time. Moreover, the currency seized was not a wasting asset; any value lost by its retention could have been restored by the addition of interest had Ivers prevailed in the forfeiture action. Secondly, Ivers was not barred from initiating judicial action himself, if he so chose. While the duty to institute forfeiture proceedings

> rests with the Government and may not be shifted to the claimant, his choice not to commence proceedings for restitution of his property provides a further indicium of his "wait-and-see" attitude. Lastly, this court is reluctant to impose a strict obligation on the Government to seek judicial relief immediately, with the increase of litigation and burdens on litigants that would entail, where, as here, the circumstances are equivocal. *A more compelling case of prejudicial delay than what has been shown here would have to be demonstrated before we would be willing to deprive the Government of a forfeiture to which it otherwise has a legitimate entitlement. Id.* at 1373 (emphasis added).

Three years ago, this court at least implicitly recognized that a showing of prejudice is essential to a claim of violation of procedural due process in the following comment: "Because of the fast depreciating nature of an automobile, the Government's claim that no prejudice to the claimant resulted from the untimeliness of the Government's action is clearly without merit." *United States* v. *One 1970 Ford Pickup Serial No. F10YRG53615*, 564 F.2d 864, 866 (9th Cir. 1977).

Appellant presented no evidence that the delay bringing the forfeiture proceedings to trial in any way interfered with the presentation of her defense in the forfeiture proceedings. Instead we are told in her brief that, "[f]inally, there can be no question that appellant was prejudiced by the government's delay." Appellant proceeds forthrightly to ask that we disapprove of that portion of *Ivers* which holds that currency is not a wasting asset. 581 F.2d at 1373.

The majority states, without citation to any authority, "[b]efore prejudice to the claimant becames relevant, the government must first show legitimate entitlement and the absence of unreasonable delay." The majority does not explain further its use of the term "legitimate entitlement." However, the reference to legitimate entitlement follows the following quotation from *Ivers:* "A more compelling case of prejudicial delay than what has been shown here would have to be demonstrated before we would be willing to deprive the Government of a forfeiture to which it otherwise has a legitimate entitlement." 581 F.2d at 1373. Put more succinctly, the quoted language simply says that this court will not reverse a judgment of forfeiture based on substantial evidence unless the appellant demonstrates from the record on appeal that the facts show "a compelling case of prejudicial delay."

I respectfully submit that the majority has mistakenly construed *Ivers* as holding that proof of prejudice is not required if the government cannot justify its delay. Neither *Ivers* nor does any other case cited in the opinion of the court so hold.

The law concerning proof of a violation of procedural due process in bringing a matter to trial, most recently recognized in this circuit in *Ivers*, can be summarized as follows:

The person whose property has been seized has the burden of proving:

1. Unreasonable or excessive delay which was not caused by his own conduct or defensive trial tactics.

2. Prejudice resulting from the delay. *See Powell v. United States*, 352 F.2d 705, 707-08 (D.C.Cir. 1965). If facts demonstrating both unreasonable delay *and* prejudice are not proved, the trial court

should not inquire into the reason for the delay. *See United States* v. *Feinberg*, 383 F.2d 60 (2nd Cir. 1967), *cert. denied*, 389 U.S. 1044, 88 S.Ct. 788, 19 L.Ed.2d 836 (1968). In *Feinberg*, the court stated "It would be unwise to impose upon the judiciary the inquisitorial function of scrutinizing the internal operations of law enforcement agencies when no possible prejudice to the accused has been shown." *Id.* at 67. If facts establishing unreasonable delay and prejudice *are* presented the burden of proof shifts to the government to offer evidence that the delay was for a valid purpose. *United States* v. *Deloney*, 389 F.2d 324, 325 (7th Cir.), *cert. denied*, 391 U.S. 904, 88 S.Ct. 1652, 20 L.Ed.2d 417 (1968). If the government cannot justify the delay, the aggrieved person prevails. If the government convinces the trial judge that the delay was excusable, the trial court must balance the interest of the government against the prejudice which will be suffered by the person whose property was taken. *See United States* v. *Marion*, 404 U.S. 307, 324-25, 92 S.Ct. 455, 465-66, 30 L.Ed.2d 468 (1971).

Applying these standards for assessing alleged violation of procedural due process to the matter before us, it is clear that it is our duty to affirm the judgment of the district court. Appellant failed to establish that she was prejudiced in the presentation of her own defense.[1]

---

[1] I recognize, that except for *Ivers*, the cases I have cited in connection with the burden of proof imposed on a person who claims that a violation of procedural due process has occurred due to governmental delay deal with loss of personal liberty. However, as noted in *United States* v. *Eight (8) Rhodesian Stone Statues*, 449 F.Supp. 193, 205 (C.D.Cal. 1978): "The Supreme Court has said that a violation of

The majority, having concluded that prejudice is not an element of due process claim, (ante Slip op. at 2370, at ——) proceeds to argue that "[a] prompt hearing is constitutionally guaranteed to the owner of currency, as it is to the owner of a wasting asset." (Ante Slip op. at 2372, at ——). No citation is given for this novel proposition. It is in fact directly contrary to the law of this circuit as most recently expressed in *Ivers* v. *United States*, 581 F.2d at 1373, where this court said, as noted above, "[m]oreover, the currency seized was not a wasting asset; any value lost by its retention could have been restored by the addition of interest had Ivers prevailed in the forfeiture action." In the matter, *sub judice*, had appellant prevailed the court could have awarded interest lost by the retention of the seized currency. The fact is that the money was properly seized from appellant. She suffered no prejudice from the delay to her defense in instituting forfeiture proceedings. The government legitimately was entitled to a judgment of forfeiture. Therefore, appellant was not entitled to the use of the seized currency pending trial of the forfeiture proceedings.

I would AFFIRM the judgment.

---

property rights may give rise to a due process claim within the same general parameters as a violation of personal rights. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552, 92 S.Ct. 1113 [1122], 31 L.Ed.2d 424 (1972)." It would be unthinkable to hold, as implied by the majority, that property rights must be given greater protection than personal rights.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-2066

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS ($8,850.00) IN UNITED STATES CURRENCY, DEFENDANT

MARY JOSEPHINE VASQUEZ, CLAIMANT-APPELLANT

[Filed Aug. 21, 1981]

Before: CHOY and ALARCON, Circuit Judges, and SOLOMON,* District Judge.

ORDER

A majority of the panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX C

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 77-1055-JWC

UNITED STATES OF AMERICA, PLAINTIFF

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS ($8,850.00) IN UNITED STATES CURRENCY, DEFENDANT

MARY JOSEPHINE VASQUEZ, CLAIMANT

[Filed Jan. 31, 1978]

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before the Honorable Jesse W. Curtis, United States District Judge, on January 17, 1978 and January 18, 1978, plaintiff being represented by its counsel, Andrea Sheridan Ordin, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, by Clifford R. Wilson, Assistant United States Attorney, and claimant appearing by and through her counsel, Nasatir, Sherman & Hirsch, by Victor Sherman, and the Court having considered the pleadings, briefs, memoranda, testimony and documentary evidence herein, as well as oral argument, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. It was stipulated that on September 10, 1975, at approximately 8:30 P.M., Mary Josephine Vasquez arrived at Los Angeles International Airport, Satellite 5, aboard Western Airlines Flight 765 from Canada. After completing immigration requirements, Ms. Vasquez proceeded to the U.S. Customs examination area of Satellite 5. Ms. Vasquez presented her Customs Baggage Declaration, CF 6059-B, to Customs Inspector William McCulloch. On her declaration she answered question 10, "Are you or anyone in your party carrying over $5,000 in coin, currency, or monetary instruments?" by checking the "No" block.

2. It was further stipulated that during normal questioning, Inspector McCulloch asked Ms. Vasquez if she was carrying more than $5,000 in U.S. currency. Ms. Vasquez replied in the negative. Inspector

McCulloch asked Ms. Vasquez three times if she or anyone in her party was carrying more than $5,000 in currency and each time Ms. Vasquez replied, "No."

3. Supervisory Customs Inspector A. Cornish observed Ms. Vasquez while she was being processed by Customs Inspector William McCulloch. Based on his experience as a Customs Inspector he concluded that Ms. Vasquez appeared to be bulky around the waist. Inspector Cornish requested Customs Inspector Mary Courtney to continue the Customs examination by a pat-down of Ms. Vasquez in a private room.

4. It was further stipulated that during the examination of Ms. Vasquez conducted by Customs Inspector Courtney, an envelope containing U.S. currency concealed inside Ms. Vasquez's longline bra was discovered. Inspector Courtney removed the envelope and counted the money in the presence of Ms. Vasquez and arrived at a total of $9,850. At that time, Ms. Vasquez volunteered that she knew how much money she had and it was not that much. At that time the money was recounted for a total of $8,850, made up of seventy-four (74) $100 bills and twenty-nine (29) $50 bills.

5. The U.S. Customs area at Satellite 5, Los Angeles International Airport, contains large color posters that state:

> "If you transport, mail, ship, or receive more than $5,000 in currency of the United States or any other country, or monetary instruments (such as traveler's checks, negotiable instruments in bearer form, or money orders) into or out of the United States, you must file a report with U.S. Customs. Ask a Customs officer for the currency report form. Failure to report can

result in forfeiture of the monies and civil and criminal penalties (31 USC 1101 et seq.)."

Several of these posters are prominently displayed above the baggage belts where passengers wait to claim their baggage prior to U.S. Customs examination. Additionally, these same color posters are posted in the U.S. Immigration area of Satellite 5 and are attached to roof support columns at eye level where passengers wait to be processed by U.S. Immigration Service.

6. On December 24, 1976, as a result of the foregoing facts, a jury in the Central District of California found claimant Vasquez guilty of violating 18 U.S.C. § 1001, a felony, and not guilty of violating 31 U.S.C. § 1101, a misdemeanor.

7. There was a fifteen month period between the time the Claimant's petition for mitigation or remission was referred to the Office of Investigation of Customs in late October of 1975 and the time a report was made to the district director in early February, 1977. Special Agent Janet Pompeo was assigned the case for investigation of the petition. She testified that after she received the request for investigation she attempted to contact Claimant's counsel to arrange for an interview. Her various telephone calls were not returned by Claimant's counsel at this time. Shortly thereafter she caused a criminal case to be opened, because after discussing the case with her supervisor she felt a crime may have been committed. After receiving Claimant's criminal history she suspected that the Claimant may have been involved in a narcotics transaction on September 10, 1975. From November, 1975 through April of 1976, she was in contact with the Montebello Police Force, the Los Angeles Police Depart-

ment, the Los Angeles County Sheriff's Department, the Office of Investigations for Customs in Blaine, Washington, and the Royal Canadian Mounted Police. These various law enforcement agencies conducted investigations to determine whether or not there was any basis for charging the Claimant with narcotics smuggling. In April of 1976 the various law enforcement agencies reported to Mrs. Pompeo that they were unable to develop evidence to support such a charge. Mrs. Pompeo conducted an interview with the Claimant in March of 1976. On May 17, 1976 she caused a report to be forwarded to the United States Attorney's Office for the Central District of California for consideration for prosecution. On June 9, 1976 she was requested by Assistant United States Attorney George King to reinterview the Customs witnesses. She conducted these interviews, and on June 15, 1976, testified before the Grand Jury. The Claimant was indicted by a Grand Jury on June 15, 1976.

8. The period of time that elapsed between the time Claimant's Petition for Mitigation or Remission was referred to the Office of Investigations and the time Claimant was indicted is reasonable. There was a reasonable basis for a suspicion that Claimant may have been involved in a serious criminal offense, namely narcotics smuggling. The Government was under no burden to indict immediately since the case might have developed into a more serious charge. In April of 1976 it turned out that there was no basis for bringing a narcotics smuggling case before a Grand Jury, and an indictment based on the original facts followed promptly.

9. The period of time that elapsed between the time the Claimant was indicted by the Grand Jury and the time this forfeiture action was filed is rea-

sonable. The result of the criminal case would be a factor that should appropriately be considered by the District Director in acting on the petition for mitigation or remission. Furthermore, the fact that the defendant currency would be evidence in the Claimant's criminal trial is a sufficient reason to suspend action on the Claimant's petition for mitigation or remission.

10. Any conclusion of law which is deemed to be a finding of fact is hereby incorporated.

CONCLUSIONS OF LAW

1. The Claimant violated 31 U.S.C. § 1101(a) when she executed Customs Form 6059-B stating that she was not carrying currency in excess of $5,000. Furthermore, she repeatedly failed to make a proper declaration during a primary oral examination. Consequently, the currency is subject to forfeiture under 31 U.S.C. § 1102(a).

2. The statutory language makes it clear that the entire amount of currency transported by the Claimant is subject to forfeiture. *United States* v. *San Juan*, 405 F. Supp. 686 (1975); contra., *Ivers* v. *U.S.*, 413 F. Supp. 394 (N.D. Calif. 1975); *U.S.* v. *One 1964 MG, etc.*, 408 F. Supp. 1025 (W. D. Washington, 1976).

3. The District Director's denial of Claimant's Petition for Remission is not reviewable unless it could be shown that there was no factual basis for the forfeiture. A factual basis for forfeiture clearly existed in this case.

4. The acquittal of Claimant on the charge of violating 31 U.S.C. § 1101 does not bar the instant action since different elements were in issue and a different burden of proof was applicable.

5. The Government must file currency forfeiture cases promptly unless there are justifiable delays. See *United States* v. *One 1970 Ford Pickup, etc.*, ——F.2d —— (9th Cir., Nov. 10, 1977). In this case, the time which elapsed was reasonable under the circumstances.

6. Any findings of fact which is deemed to be a conclusion of law is hereby incorporated.

DATED: This 31 day of January, 1978.

/s/ Jesse W. Curtis
United States District Judge

Presented By:

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 77-1055-JWC

UNITED STATES OF AMERICA, PLAINTIFF

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS ($8,850.00) IN UNITED STATES CURRENCY, DEFENDANT

MARY JOSEPHINE VASQUEZ, CLAIMANT

[Filed Feb. 6, 1978]

JUDGMENT

This matter having come on for trial before the Honorable Jesse W. Curtis, United States District Judge, on January 17, 1978, and January 18, 1978, plaintiff having been represented by its counsel, Andrea Sheridan Ordin, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, and Clifford R. Wil-

son, Assistant United States Attorney, and claimant appearing by and through her counsel, Nasatir, Sherman & Hirsch, by Victor Sherman, and the Court having considered the pleadings, briefs, memoranda, testimony and documentary evidence herein, as well as oral argument, and in accordance with the Findings of Fact and Conclusions of Law herein:

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be, and the same hereby is, entered in favor of plaintiff and against claimant condemning and forfeiting the defendant $8,850.00 in United States currency to the United States of America.

IT IS FURTHER ORDERED that the United States Marshall shall cause said currency to be delivered to the District Director of United States Customs, 300 South Ferry Street, Terminal Island, California for deposit to the account of the United States Treasury, and make his return thereof into Court.

DATED: This 31st day of Jan., 1978.

/s/ Jesse W. Curtis
United States District Judge

Presented By:

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Chief, Civil Division

/s/ Charles W. Kircher, Jr.
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Attorneys for Plaintiff.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1961 357531 669

Joint Appendix

Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1062

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

Petitioner

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS IN UNITED STATES CURRENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 7, 1981
CERTIORARI GRANTED MARCH 22, 1982

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1062

UNITED STATES OF AMERICA,

Petitioner

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS IN UNITED STATES CURRENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
3/22/77	jcd	1. Fld Complt. Issd W/A.
4/1/77	ct	2. Fld Pltfs Warrant for arrest in actn in rem Seized deft Currency now located at US Customshouse, 3/23/77.
4/25/77	rlb	3. Fld CLAIM of Mary Josephine Vasquez; affid of Victor Sherman.
4/27/77	caw	4. Fld clmt/ptnr. Mary Josephine Vasquez, ANSWER to complt.
4/28/77	rlb	5. Fld Mars rtn of srv, srvd 3/30/77 on Mary Josephine Vasquez.
5/13/77	ct	6. Fld Cts ORD re Early meetg requirement; PTC set for 7/25/77, 10am.
5/25/77	ct	7. Fld Pltfs Ntc of tlg depos of Mary Josephine Vasquez, 6/23/77, 10am.
6/2/77	rlb	8. Fld pltf's status report.
6/30/77	rlb	9. Fld pltf's 2nd ntc of tkng depos of Mary Josephine Vasquez on 7/27/77.
7/6/77	cb	10. Fld pltf's notc of mtn & mtn to dism claimant's claim & Answer, & for expenses, retble 8-1-77 at 10 am.
7/8/77	cb	11. Fld stip & ORD contg pretrial conf retble 9-26-77 at 10 am.
	ct	12. Fld Crts Ntc of pldg schdl in response to a mtn & contg hrg dt to 8/1/77, 10am.
7/11/77	ct	13. Fld Pltfs memo of Contentions of Fact & Law.
7/8/77	tm	14. Fld Notc of Motn & Motn for S/J retnble 7/25/77; memo of P/A in supp; affid in supp of motn for S/J.

DATE	NR.	PROCEEDINGS
7/19/77	tm	15. Fld pltf's memo of P/A in oppos to claimant's motn for S/J.
		16. Fld claimant's oppos to pltf's motn to dism claimant's claim & ans, and for expenses; memo of P/A in supp; affid of Victor Sherman.
6/2/77	ct	17. Fld rtrn Alias summs serv'd Donald C. Alexander, 5/24/77.
7/21/77	ct	18. Fld Pltfs Reply in supp of its mtn to dism & for expenses.
7/25/77	ct	19. Fld Claimant's Response to pltfs memo of P/A in oppos to claimant's mtn for S/J.
		20. MIN ORD: ORD cont'g hrg of mtns. Crt mtns ORD that hrg of Pltfs mtn to dsim claimsn's claim & ans & claimant's mtn for S/J now set for hrg on 8/1/77, be & hereby is cont'd to 8/15/77, 9:30am.
7/28/77	ct	21. Fld Pltfs amended second ntc of tkg depos of Mary Josephine Vasquez, 8/31/77, 10am.
8/17/77	tm	LODGED pltf's proposed Ord that the claimant's motn for S/J be denied, Fur Ord that pltf's motn to dism claimant's laim & Ans be denied.
8/15/77	tm	22. MIN ORD: Pltf's motn to dism claimant's claim & ans, etc. Claimant's motn for S/J, both motns are denied. Claimants cnsl is to pay govt's expes of $83.00 for his failure to appear at a deposition.
8/18/77	tm	23. Fld pltf's ORD denying claimant's motn for S/J.

DATE	NR.	PROCEEDINGS
8/22/77	tm	24. Fld claimant's notc of tkng depos of John E. Brady & Janet Pompeo on 9/28/77.
8/23/77		25. Fld pltf's amended 3rd notc of tkng depos on 9/28/77.
9/11/77	tm	26. Fld pltf's notc of motn & motn for protective ord, retnble 9/19/77, 10AM; memo of P/A in supp.
9/19/77	tm	27. Fld claimant's oppos to pltf's motn for protective Ord; memo of P/A in supp.
10/14/77	tm	28. Fld pltf's reply to claimant's oppos to motn for protective ord.
10/20/77	tm	29. Fld Claimant's Stip & ORD to cont PTC retble 11-7-77 10am.
10/23/77	ct	LODGED Pltfs proposed ord to crt.
11/19/77	ct	30. MIN ORD: Pltfs' mtn for Protective ord. Mtn is GRNATED in aprt & DENIED in part. Cnsl for claimant may tk depos of Pompeo by notc of Brady.
11/27/77	ct	31. Fld Pltfs Amended 4th ntc of tkg depos of Claimant Mary Josephine Vasquez, 10/20/77, 10am.
11/28/77	ct	32. Fld ORD that claimnts proposed depos of Dist Director J.E. Brady, U.S. Customs service, will not be allowed, while the claimant's proposed depos of Special Agent Janet Pompeo, U.S. Customes service, may proceed.
11/28/77	ct	LODGED Pltfs Proposed PTC ord.
12/7/77	ct	33. MIN ORD: PTC. cnsl are pres & PTC held. Deft to file memo of Cont/Fact & Law w/in 10 dys. A 2 dy C/T set for 1/17/78, 9:30am.

DATE	NR.	PROCEEDINGS
		34. Fld Pltfs PTC ORD.
12/8/77	ct	35. Fld ORD re Trail prep for C/T, nlt 1/6/78.
12/15/77	ct	36. Fld claimant's amended 2nd ntc of tkg depof of Janet Pompeo, 12/16/77.
12/18/77	ct	37. Fld Claimant's -emo of Cont/Fact law.
1/6/78	cw	LODGED PROPOSED FIND/Fact & conclu of law.
1/16/78	nm	38. Fld ORD (JWC) (MML), dtd 1/13/78, transfg the action to the cal of Judge Curtis for all fur procdgs. Attys notified. Local rule 2.
1/17/78	cw	39. MIN ORD: C/T 1st day: cont to 1/18/78 9:30am.
1/18/78	cw	40. MIN ORD: C/T 2nd day; judgment by crt for pltf; find/fact & conclu of law to be parpared by pltf.
1/23/78	cw	LODGED pltf's proposed find/fact & conclu of law.
1/31/78	cw	41. Fld pltf's find/fact & conclu of law.
2/1/78	cw	LODGED proposed pltf's judgmnt.
2/6/78	cw	41. Fld pltf's JUDGMNT & ORD that judgmnt be ent in favor of pltf & gnst claimant condemning & forfeiting the deft $8,850.00 in United States currency to the U.S. of America. fur ORD the Marshal shall cause asid currency to be delivered to the District Dir of United tSates Customs, 300 South Ferry St., Terminal Island, Calif. for deposit to the account of the U.S. Treasury & make his retn to crt. Ent. 2/7/78, mld cpy to pltf, Motif ptys. JS-6.

DATE	NR.	PROCEEDINGS
2/13/78	cw	43. Fld STIP & ORD staying judghmt of forfeiture pending appeal & for deposit of deft currency in an interest-baring regular passbook account at a savings & loan institution w/in two weeks for the enty of ord pur to this stip. Ent. 2/14/78. mld cpy to ptys.
2/9/78	cw	43. Fld Claimant's oppos to find of fact & conclu of law.
2/23/78	ct	44. Fld Claimant Mary Josephine Vasquez's NOTICE OF APPEAL fr the jdgmnt of forfeiture of the deft Currency entered in this actn on 2/7/78.
3/7/78	ct	45. Fld Claimants Designation of Recrd on Appl.
3/17/78	ct	46. Fld Pltfs Counerdesignatn of Rcrd on appl.
4/7/78	ct	47. Fld Claimant/Appellant's Applctn to rpceed in forma Pauperis, Declartn & ORD thereon.
5/10/78	fb	Fld orig & 3 cpys of Rptr's transc of prcdgs had on 1/17/78 & 1/18/78.
5/12/78	fb	Issd & fwd to C/A lcc & 2 printed cpys of Clk's rec on appeal. Along w/orig & 1 cpy of Reptr's transc of prcdgs had on 1/17/78 & 1/18/78. Svd cnsl w/cpy of Clk's rec on appeal and Reptr's transc.

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 77 1055 MML

UNITED STATES OF AMERICA, PLAINTIFF

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY, DEFENDANT

COMPLAINT FOR FORFEITURE

United States Customs Service
[31 U.S.C. § 1102]

For its claims against the defendant currency, the United States of America alleges as follows:

1. This Court has jurisdiction under 28 U.S.C. § 1345 and 31 U.S.C. § 1102.

2. On September 10, 1975, Mary Josephine Vasquez transported into the United States the defendant currency ($8,850) at Los Angeles International Airport without making the report required of her under 31 U.S.C. § 1101 and 31 C.F.R. §§ 103.23(a) and 103.25.

3. By reason of the foregoing, the defendant currency ($8,850) is subject to forfeiture to the United States under the provisions of 31 U.S.C. § 1102 and 31 C.F.R. § 103.48.

4. The defendant currency was seized by duly authorized agents of the United States Customs Service at the Los Angeles International Airport on September 10, 1975, under Seizure No. 76-2720-00200, and is presently located in the seizure storage area at the Customhouse, 300 South Ferry Street, Terminal Island, California, within the jurisdiction of this Court.

WHEREFORE, the United States prays that due process issue to enforce the forfeiture of the defendant currency, and that due notice be given to all interested parties to appear and show cause why the forfeiture should not be decreed.

DATED: March 18, 1977.

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Chief, Civil Division

/s/ Matthew A. Schumacher
Assistant United States Attorney

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JESSE W. CURTIS, SENIOR JUDGE PRESIDING

No. CV 77-1055-JWC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EIGHT THOUSAND EIGHT HUNDRED FIFTY ($8,850) IN UNITED STATES CURRENCY, DEFENDANT

vs.

MARY JOSEPHINE VASQUEZ, CLAIMANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PLACE: Los Angeles, California

DATE: Tuesday, January 17, 1978
Wednesday, January 18, 1978

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[3] LOS ANGELES, CALIFORNIA,
TUESDAY, JANUARY 17, 1978; 9:30 A.M.

THE CLERK: No. 1 on the calendar, CV 77-1055-JWC, United States of America vs. Eight Thousand Eight Hundred Fifty Dollars.

Please make your appearances for the record.

MR. WILSON: Clifford R. Wilson, Assistant United States Attorney on behalf of the United States.

MR. SHERMAN: Victor Sherman appearing for the defendant and real party in interest, Mary Vasquez.

THE COURT: Gentlemen, I think that the defendant has the burden of proving this case, that the forfeiture should not go through and perhaps should therefore state the issues as he sees them. You may lead the argument from there.

MR. SHERMAN: I think I disagree with the Court who has the burden, but I will be happy to go first.

THE COURT: I am not speaking as a technical matter, but you are the one who are raising issues that would defeat the government's claim and, therefore, I think you should state what they are.

MR. SHERMAN: I will be happy to, your Honor. Very briefly, and as we discussed in chambers, the Court will recall that the undisputed facts in this case are that, in I believe August—

[4] THE COURT: Why don't we look at it this way, gentlemen. I have before me briefs that are pretty thorough with respect to all the issues that you raise, and I am wondering whether it would be profitable for us to take the time here for you to restate that which is probably more clearly stated in your written arguments than you would be inclined to state them here, in which event we can retire to the library and go to work.

If you have something you think would be helpful to the Court in addition to what you have said in your papers, then limit your remarks to that.

MR. SHERMAN: It will be very brief, because there has been some new facts and some new decisions since we submitted the authorities.

One of the basic questions is whether or not the District Director of Customs is required to give a reason for a denial of a petition for remission and, if any reason is required, what was the reason in this case?

I might say, for the record, that there are numerous correspondence directed to the District Director by me inquiring as to the reason for the denial of the petition, and so far the government has chosen not to disclose any reason for the denial of the petition for remission.

Furthermore, in a deposition taken of Janet Pompeo, who is the Customs agent—just this past week and [5] which we can submit to the Court, I am sure, as evidence in this case—Ms. Pompeo testified to two relevant facts.

Number one, she is not the person that made the decision as to why the petition for remission was denied, and has no idea as to why the petition for renewal was denied.

Number two, the primary reason for the time delay in reaching a decision on the decision for remission was because it was her understanding of a formal policy in her office that petition for remissions were not to be decided until the completion of a criminal trial. And the reason for that being that the money seized would be potential evidence in a criminal trial; therefore, no decision was to be made until the criminal trial was over.

So, I think two important facts have now come forward in this case.

Thirdly, I am informed by Mr. Wilson, the Assistant United States Attorney in this case, that there is no written reason anywhere in the Customs file as to why the petition for remission was denied. And the only witness he has to date to present on that question is, apparently, a Mr. Nelson from the Bureau of Customs, who cannot testify that he had anything to do with the decision in this case, but can only give some testimony as to

what he thinks might have happened or what might have happened in similar cases. But the government is unable to produce the witness who, in [6] fact, did make the decision in this case, because they don't know who made the decision in this case.

The only written evidence indicating who made the decision in this case is a letter denying the petition for remission, which was signed by Mr. Brady who, at that time, was the Director of Customs. And I believe he is no longer with the government.

Is he still the District Director?

A VOICE: Yes.

MR. SHERMAN: The Court will also recall at one time I tried to take his deposition and inquire from him as to the basis for his decision, and the government resisted that request.

The other point, your Honor, is that since the papers have been prepared in this case, there was a decision in the Ninth Circuit, which was a case in which I was the attorney for the claimant, the 1970 Ford case.

THE COURT: Are you saying "1970"?

MR. SHERMAN: Yes. 1970.

MR. WILSON: A copy is attached to the supplemental trial brief the United States filed, your Honor.

MR. SHERMAN: United States of America vs. One 1970 Ford pickup, Case No. 75-2944.

In that case, the Court of Appeals and it was a panel of Merrill, Ely and Choy, held that an 11-month [7] delay between time of seizure and the filing of the petition for remission was too lengthy a period of time; and therefore, the government was barred under the statutory scheme or by laches from proceeding with the forfeiture.

In this particular case, a petition for remission was filed on behalf of the plaintiff. The only section in the Code that talks about petitions for remission being filed is 19 U.S.C. 1618. That is the remission statute.

THE COURT: 1618?

MR. SHERMAN: 1618.

The statutory language, which is referred to in the Ford case, is also within the 19 United States Code Section, which talks about how this petition for remission has been handled.

The courtesy section, which is 31 United States Code, Section 1101 et seq, talks about the filing of a petition for remission.

And the only remission statute referred to in the United State Custom law is 19 United States Code Section 1618 and the sections surrounding that, and that particular section not only talks about vehicles, but also talks about any merchandise, baggage, et cetera, seized by United States Customs.

So, I submit, since the petition for remission in this case was filed pursuant to Section 1618, that the basis [8] of the decision of the Ford case would be the same as in this case, because those are the only remission statutes in the Customs law.

Again, 1618 refers not only to vessels or vehicles, but also refers to merchandise or baggage. As I say, although the government is claiming that vehicles are in a different category, since the petition for remission for remission statutes are talked about in the monetary instrument sections, and those are the only ones in the Customs law, it must be the same statute. In fact, the affidavit that I filed in this case is called the Petition for Remission. It was treated as a petition for remission.

So, I think that the first thing that the Court has to decide is whether or not the Bureau of Customs has to give any decision and, in this particular case, no decision was given. That is undisputed, even though I requested it before and after that they give some reason for the denial of the petition for remission.

I think that, in conjunction with their reasons for the delay in this case, as reasons for denying the forfeiture, because I see absolutely no logical basis for delaying the decision until a criminal trial is over, just become some theory as if they act upon the petition somehow affects the

evidence in the criminal case. Obviously, if they deny the petition, they still have the money.

[9] If they grant the petition saying, okay, you can have the money back, but they want to keep it as evidence, certainly they can seize the money under some criminal—

THE COURT: Don't you think there is plenty of reason wanting to wait until the criminal proceeding has been completed? Normally, you think that if there were an acquittal that that would pretty well take care of the matter. Certainly, if there was a conviction, there would be no question. They would not have to make any further investigation and the case would be decided for that.

If there is an acquittal, they might be inclined to go along and release it or give it another look, a closer look, realizing they have to have something more to hang their hats on then a mere criminal conviction.

MR. SHERMAN: In this case, we had a problem that there was a conviction and an acquittal. This is a very unusual case, from that point of view. Two counts. One they convicted her and one they acquitted her. So, I do not know if it helped or hurt in the criminal case; however, since the statutory language requires immediate action, "forthwith," immediate, et cetera in the remission statute, I didn't see any reason for waiting until the criminal case is over, particularly in this case where the petition for remission was under review for nine months before they even brought a criminal indictment.

[10] If they would have arrested her and started criminal proceedings at the very time they seized the money, then you might say that the criminal proceedings would go further than the remission proceedings. Then it might be advisable to wait for the criminal proceeding. But in this case, there was the nine-month period between the seizure of the funds and the return of an indictment.

THE COURT: How much after that elapsed did you file your petition? Right away?

MR. SHERMAN: Filed the petition right away.

THE COURT: How much longer after the conviction and the acquittal took place was the action taken by the—

MR. SHERMAN: Approximately four months. Again, I might say, I don't know how much has influenced them, but I constantly wrote letters after the completion of the criminal trial, and I do not know if it was in response to my letter or the normal course of affairs, but in any event, it was only after I wrote the letters was a decision rendered.

And of course, the Court can see between the time of the seizure of the funds and the decision on the petition for remission was approximately 16—15 months.

Ms. Pompeo, in her deposition, did not say that the reason for the delay in this case was to see what the outcome of the criminal case was. But, because they didn't want to do anything regarding the money before the criminal [11] case was completed. I think there is a distinction there which, I think that may be Customs was under some kind of thinking that, well, if we grant or deny the petition, somehow that will affect evidence. But, obviously, the government can withhold evidence that they have in the criminal case if they are going to contemplate criminal action without having returned it, without even granting a criminal petition.

Furthermore, during this, the nine month period, I don't know that they knew that a criminal indictment was going to come down or not. There doesn't seem to be any relationship between those two things. Anyhow, I think that the first two issues that the Court has to decide is: Does the government delay in this case? Or, the time period between the seizure and the ultimate decision which was primarily the basis of the pending criminal trial, if that is sufficient reason? And, two, does the blanket statement, "We deny your petition" without any supporting reason, is that sufficient?

THE COURT: I see your point.

MR. SHERMAN: Before we do anything else, I think the Court should indicate some decision on what it wants to do.

THE COURT: Do you wish to be heard?

MR. WILSON: Yes, your Honor. Initially, Mr. Sherman argues that the 19 U.S.C. statutes are applicable, and [12] he seems to reach that conclusion by this argument that, well, there isn't any other statute around, and it must be since it's called a petition for remission falls within the 19 U.S. series. That is not the case.

The seizure, and the basis for forfeiture of this currency, the defendant in this case, is the 31 U.S.C. sections that are cited in the pleadings. Now, the provision for a petition for mitigation or remission within that section is found within the initial regulations.

If he bothered to look at them, he would find that citation.

The point is, that the 1970 Ford case is clearly grounded on a finding of inherent timeliness within the language of the 19 U.S.C. statutes relating to petitions of for mitigation or remission.

Consequently, we do not have statutory language on which the Ninth Circuit based its ruling in 1974.

Subsequently, it is our position that the case is totally not controlling, insofar as it may be considered to be controlling, and I am not conceeding that it is by any means. The Ninth Circuit clearly required a showing of prejudice, and the vehicle forfeitures, you have vast depreciating assets. You have severe economic hardships to individuals whose vehicles are seized, and are proposed to be forfeited.

[13] In this case, we have currency, which by its very nature is not depreciable, except through the effects of inflation—which could be easily remedied by having the money deposited in an interest bearing account—if necessary, which it was never done or there was no interest in having it done in this case. However, I believe the

interest over a period of a year wouldn't be anything substantial, anyway.

The point is that merely because in the vehicle forfeiture area the government is held to a strict time requirement, that does not mean that every forfeiture the government brings is applicable to the same standards. There are forfeitures under the Endangered Species Act, for instance, to which there are different policy considerations at stake; different considerations at stake.

The mere fact that the statute provides for forfeiture does not mean under the 1970 Ford case that there is this requirement, that it be done within a very, very narrow time period.

Obviously, the outside limit is the statute of limitations. In some cases, without conceding the point, I suppose that a claimant might be able to bring a claim of laches where there is delay in bringing the government claim within the applicable statute of limitations, they are no longer to put on their case, the witnesses have died, or [14] moved away, or some other reason, there has been some prejudice done to the claimant.

In this case, there is absolutely nothing that the claimant can point to that in any way her interests were harmed by a 15-month delay between the time the money was seized, and the time the decision was made on the petition for mitigation or remission.

Now, Mr. Sherman tried to characterize Ms. Pompeo's testimony—I think in her deposition the most important point is that she does not know why the petition for mitigation or remission was denied. That is her function. She is merely an investigator. If you will read her deposition along with her earlier affidavit, areas that were not gone into in the deposition, she indicated that the first five months of this nine-month delay was resulting from the fact that Mr. Sherman was unavailable for interview. That alone, that time, should not be charged against the government by any means.

Naturally, this testimony will come out during the course of the trial, if necessary. So, I don't see any reason to try to characterize it at this time.

The most important point, I believe is that the 1970 Ford case does not apply. And even if it does apply, claimant cannot show any kind of prejudice, and has not shown any kind of prejudice.

With respect to the reviewability of the decision [15] of the District Director on the petition for mitigation or remission, admittedly there are no recent reasons for the decision; however, there is nothing that requires the agency, in an area where their decision is not reviewable, to give reasons.

Now, even if it were reviewable and we get into some very fine distinctions here on an arbitrary or capricious task, the only thing that would be required would be to show that there was some reason for the decision, some reason, even if the reviewing court does not agree with it.

I believe the testimony in this case will be that, if necessary, that the decision, the reason for the decision denying the petition for mitigation or remission was Miss Vasquez' prior criminal history and her involvement with narcotics traffic.

I think the government pointed out, and this will also come out in testimony if we go into this at trial, there was some concern as to whether or not the outcome of the criminal trial would affect what they were going to do. In fact, the matter was never referred to the District Director for decision, because things were still happening in the case. In other words, there was no basis for the investigator, Ms. Pompeo, to send a final decision to the District Director, a final report to the District Director so he could make his decision to the petition for mitigation, until the criminal [16] trial is over.

It does not make any sense. That is clearly a factor that should be considered by the District Director.

Just to sum up, our position is that the decision is not reviewable, and there is no need for testimony whatsoever.

On the laches or due process, or time limit product, whatever you want to call the 1970 Ford case, even if it does apply, there is no prejudice.

THE COURT: It seems to me that we ought to be able to resolve this in an hour. It is a quarter to. It is about 15 minutes after 3:00. We will adjourn until about 15 minutes after 4:00, and maybe we can resolve this issue to the point so we know what to do tomorrow anyway.

MR. WILSON: Thank you, your Honor.

(Recess.)

THE COURT: As to the first issue of whether or not the decision of the Secretary, as the statute is referrable, I am of the opinion that the decision or termination of whether or not the Statute 1101 is applicable and the facts upon which that applicability is determined, that question is one which is reviewable.

In other words, if the Commission decided that, notwithstanding that the claimant's contention that she did, in fact, file a claim—and suppose she says she filed a [17] claim and the government says that she didn't file a claim and we didn't get it, and she says, I did—that is an issue of fact.

If the Secretary determined that she did not file a claim and made a decision of that kind, that would be reviewable. Any facts upon which the applicability of the statute relies, I think, come within the possibility of review. But, I take it here that either in the affidavits or stipulations that have been filed, it appears that the claimant did, in fact, come across the border with American money in excess of $5,000, knowing that she had in her possession an amount in excess of $5,000; and that she did not make a claim, did not file a report as required

by the statute. The statute is applicable and the money is subject to forfeiture.

Now, she can make a claim petition for remission and a determination as to whether or not that remission should be allowed is solely within the discretion of the Commission, or the Secretary. And I think at that point, the Court has no power to review that decision.

We have the next question as to how much may the government forfeit, forfeit in any amount of excess of the $5,000. There is some authority to the effect that they cannot. There is some authority that they can. If I were to interpret that statute, as I guess I am called upon to do, [18] it says: "Any instruments which comprise this package are subject to forfeiture."

Now, I take it not only any, but that all of them come within that exception; that definition is subject to forfeiture and I would, therefore, hold that the entire amount is subject to forfeiture.

Now, the question of delay or laches. The question of whether or not nine months between the time of the seizure and the time of the criminal prosecution has commenced, I think involves a question of fact. It could be too long and maybe it is excusable. But I think that it is the Court's problem, and I am going to have to take some evidence on why the delay was for so long. There is a considerable amount of money that belongs to a person who can be seriously jeopardized by being deprived of it for a period of nine months. And the fact that she does not know for that period of time is jeopardizing, even though she may ultimately lose it. So, I think we are going to have to take some evidence on that one aspect of the case in order to determine whether or not there was some justifiable reason for such a delay. That is the narrow issue I think we should proceed on.

MR. SHERMAN: Your Honor, a couple of questions. First of all, there was testimony at the criminal trial that the reason she did not file the appropriate form

under 1101 [19] is because they did not give her an opportunity to do so.

THE COURT: Didn't she file? I thought she filed one, but it was for a lesser amount.

MR. SHERMAN: No.

THE COURT: Did not file any at all?

MR. SHERMAN: What happened, there was the testimony in the criminal trial that she was not given an opportunity to file the 1101 form because she did not say that she had more than $5,000.

In other words, it is two-step procedure. They don't give you the form unless you tell them that you have more than $5,000 in your possession. The jury, obviously, from its decision, found that she had lied to the Customs agent about having more than $5,000, but that she did not knowingly violate 1101, because they did not give her an opportunity to file the form, either because she did not know the law, or did not see the posters, or they did not tell her. So, your decision that what you have indicated that it is only reviewable as to whether or not she comes within the statute, I think, is another question of fact here as to whether or not she was given an opportunity to file the form 1101.

I think the jury verdict, obviously, was that she was not given that opportunity, and there is testimony to that effect.

[20] THE COURT: We do not know what the jury found. All we know is she was found innocent of that charge. We do not know what the jury based their verdict on.

MR. SHERMAN: All I can tell you from being the trial attorney, there was testimony from the agents, and the Court also made comment after the jury came in about this particular point—at the end of the transcript —that that is what they must have found. And there was a colloquy between Judge Hauk and some members of the jury.

Anyhow, the testimony was that she was never given the form to fill out. Even after they found the money, there was the question of—

THE COURT: Well—

MR. SHERMAN: So, there is, I think, a question. That question. Also, you are talking about the nine-month delay between the time of the seizure of the money and the filing of the indictment, but I think also a question of delay whether or not once the indictment was filed she could—

THE COURT: I have considered that. The thing that is obvious to me that that period of time and for that reason would be a reasonable expectation. Once they filed the indictment and the prosecution commences, I can well understand why they would not want to process a claim in the meantime. Suppose they were remitted on the theory that she [21] did not think she was guilty and the jury convicted her. Or, vice versa. And I think that that would be a natural inclination on the part of the department to say, "Let us wait and see what happens in the criminal case. If she is acquitted, then, she will either have to back down or give it a long hard look again to see whether we still have enough reason to go ahead." So, I do not think that that part would make any difference.

MR. SHERMAN: All right. Of course, I disagree with your Honor.

THE COURT: Yes.

MR. SHERMAN: What about the fact in this case where you had the two charges. One, the felony and the misdemeanor, and the misdemeanor for, specifically the forfeiture section and they acquit her?

THE COURT: There again, as I say, you have got two standards. It would not be the first time that a criminal jury had decided one thing and a civil jury another.

MR. SHERMAN: The point I am trying to make, if they are waiting to see what the criminal jury does, and

if we assume for the moment, just for the sake of argument that it had some bearing whether or not she was convicted of 1101—and she was acquitted of that—and then they disregard that and do not give her the money back, what would be the point of waiting?

[22] THE COURT: Of waiting?

MR. SHERMAN: Yes. If, in fact they are waiting to see what they do, and they do something that they do not like—

THE COURT: As I say, I do not think that that is unusual and out of the ordinary for a defendant like that to put all their claims to say, let's wait and see what the jury does. The jury acquits her and that is some indication, maybe, that we ought to release it. So when the jury acquits her, they start processing the claim and say let us see what kind of evidence we have here. Should we grant her petition or shouldn't we? If we are going to deny it, we are going to have to find some other reason in the evidence to do it. And it may therefore reconsider everything, in spite of the fact that the jury acquitted her. We still think she is not entitled to remission.

MR. SHERMAN: In this particular case they have never given any reason.

THE COURT: They do not have to, because you are in an area where their discretion is just as counsel said just a while ago, it is like granting probation. We think under the circumstances here she is not entitled to it.

MR. SHERMAN: There has been plenty of case law where, I am sure your Honor is aware of, if in granting a sentence or not granting a sentence, in probation, the trial [23] court takes into consideration things outside the record, or improper things, that that is improper.

THE COURT: It is improper if the Court tells what the basis for its decision is, but if he does not tell anybody what his basis of decision is, which he is not required to do, you cannot get into trouble.

MR. SHERMAN: You are putting—well, all right. You know, you made your decision.

THE COURT: It looks to me if Congress intended the discretion to be exercised solely by the head of the department in that area, then it is not intended that the Court should rule.

MR. SHERMAN: That would be true, even if we show in this case that somebody pushed the letter under Mr. Brady's nose and he signed it and he never looked at anything.

THE COURT: If that were the case, then, there would have to be a showing. I think we are entitled to use some presumption of irregularity here. The proper procedure has been followed. It has gone through the stages of what appear to be a normal process, unless there is some indication, some affirmative proof that there have been some variations from the regular process, then I think the presumption of regularity would control.

MR. SHERMAN: But in this particular case I attempted to question the District Director as to his [24] decision, or what it was based upon, even if they do not have to tell me the reason for his decision whether he looked at anything or, in fact, what happened is what I conjecture. And the government's position is that you cannot even ask him that. And the only person I could ask that question of was Ms. Pompeo, and she has no idea why he made that decision. So, you say there must be a presumption of regularity. How am I supposed to show that?

THE COURT: Sometimes you cannot.

MR. SHERMAN: I realize the Court does not want to open a Pandora's Box, but on the other hand, some elemental fairness would seem to require that I be given some opportunity to show that the decision was arbitrary or that the government show some basis for some decision.

They have candidly admitted that there is nothing in any Customs file anywhere, why he made his decision, or who made the decision, other than the letter of Mr. Brady to me. There is nothing in this record to show

why he made his decision, what it was based upon. Anything. Except, "I deny it."

And they say they do not have a single document anywhere.

THE COURT: They do not have the burden of proving it. You do.

MR. SHERMAN: They are saying we have nothing to [25] support it. No reason. I am saying, okay. Then, let me take the deposition to find out and, then they are saying no, we won't give you that opportunity.

THE COURT: I am sure the government would contend that the petition for remission has been processed in accordance with their usual procedure.

MR. SHERMAN: I am sure.

THE COURT: They may not know who did it as they look back on it now, but I am sure they contend that they followed the usual procedure and was the result of the exercise of discretion of someone in the organization. They may not be able to pinpoint who did it, or what the reason was now, and that makes it pretty difficult for you to prove that there was some basis for the setting it aside.

But if you don't have the proof, you can't do it.

MR. SHERMAN: But, by the Court's ruling in this case, they are preventing me from even attempting to get the proof. I would like to look at the Customs file, or speak with the District Director, to see what he did and why, just to see if it was done in the regular course. I have no idea if this was done in the regular course, if they won't let me look at the files to see that.

THE COURT: What you are asking for is a broad fishing expedition, which is based upon nothing but the ordinary assumptions of wrong-doing or irregularity. That [26] kind of an examination can only be justified where there is some strong indication that there has been some failure to follow the rules or to deal in the manner with some irregularity.

MR. SHERMAN: Don't you think I have met some burden to go forward where I have shown that there is nothing in the Customs file according to the government's attorney that says why they made the decision? Nothing.

THE COURT: I do not think so.

MR. SHERMAN: Okay. Then, I take it—

THE COURT: I take it we are ready to proceed on the one issue of laches or whether or not there has been a due process here by reason of the nine months delay.

MR. SHERMAN: Whose burden is that? And how do we get at that issue? Because I am sure that the testimony is going to be that Ms. Pompeo did not take it to the United States Attorney's office Criminal Division until she completed her investigation.

THE COURT: Let us find out what took her so long. I think the government, at least, as the burden of going forward at this point to show why there was such a delay and to show any excuse for it, if there is any.

MR. SHERMAN: I think that that is going to be simple testimony. She is going to say that she couldn't get an interview with the defendant.

[27] THE COURT: Are you willing to stipulate to that?

MR. SHERMAN: No. Again, I have never heard and, you know, you have been a judge a lot longer than I have been a practicing attorney, but I never heard the government delay a criminal prosecution because they could not get a personal interview with the defendant as being any kind of a reason.

THE COURT: Let us put her on the stand and find out.

MR. WILSON: Your Honor, I take it from your rulings that you feel that unless there is some reason for applying some laches doctrine to this case that the money is otherwise forfeitable, there would be no need then for testimony as to what happened at the airport and so forth. The admissions—

THE COURT: That is true, if my assumptions which I stated first are in the record. If it has been established, and I take it it has, then either as a part of the motion for summary judgment or otherwise, that the petitioner did, in fact—or the claimant did, in fact, come into this country with more than $5,000 and failed to make a report or make a report for a lesser amount. And furthermore, that she was later found to have had it secreted on her person.

MR. WILSON: I think we can take care of that rather easily, your Honor, and perhaps save the witnesses [28] some time.

The complaint alleges, in paragraph two, that on September 10, 1975, Mary Josephine Vasquez, transported into the United States the defendant currency, which is $8,850, at Los Angeles International Airport without making a report required of her under 31 U.S.C. Section 1101, and 31 CFR Sections 103.23(a), and 103.25.

The claimant, in her answer, admitted that allegation. I believe that would be enough record for the Court, unless there is some other valid legal defense—

THE COURT: There ought to be some evidence as to establish the fact that she did not do it knowingly. Did that say "knowingly"?

MR. WILSON: No, and it is not our contention that it is a requirement of the statute that it be a knowing transportation, either.

THE COURT: There has to be a knowing transportation. Suppose somebody has hung a $10,000 on their coattail and they walked through with it. Is that a violation? There has to be a knowing possession. I don't mean that she has to know what the law is. I mean, she has to know that she had some money on her possession. And I assume there is no question about that.

MR. SHERMAN: There was a question about that in the criminal trial.

[29] MR. WILSON: We will go ahead and put on all of our testimony. It shouldn't take too long.

THE COURT: It is a quarter to 5:00. Shall we start the first thing in the morning? Do you have your witnesses here?

MR. WILSON: I do have one witness here that is here from Denver. His testimony really should not take too long, and if the Court will indulge me so he can return to his home and residence tomorrow morning.

THE COURT: All right. Put him on.

MR. WILSON: All right. The government calls Special Agent Cornish.

MR. SHERMAN: Your Honor, may I make a suggestion? That since the transcript of the criminal trial is now completed and we went into this issue, otherwise we are going to be here quite a while if we get into this issue. Let us just incorporate by reference. That was the motion to suppress from the criminal trial. He has read it. I have read it. We can give you a copy.

THE COURT: Is there testimony that you want which is in addition to or beyond that in the criminal trial from this witness? It is up to you gentlemen what you want to do.

MR. WILSON: Counsel has been making the suggestion all along, and I have all along suggested if we could [30] specify the pages he felt were required, we will be able to do so. I did not handle the criminal trial, obviously and, although I have reviewed the record, I am not prepared at this point to say all the testimony that I want is in the record.

THE COURT: Suppose you put this witness on and then by tomorrow, perhaps, you can decide whether or not—

MR. WILSON: I think that would make more sense.

ALBERT CURTIS CORNISH,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your full name and spell your last name for the record.

THE WITNESS: Albert Curtis Cornish, C-o-r-n-i-s-h.
THE CLERK: Thank you. Be seated over there.

DIRECT EXAMINATION

BY MR. WILSON:

Q. Mr. Cornish, what is your position with the government?

A. Supervisor, Customs inspector, presently in Denver.

Q. What was your occupation on September 10, 1975?

A. Supervisor, Customs inspector at Satellite 5 at [31] the International Airport here in Los Angeles.

Q. Did you have an occasion on that date to observe the claimant in this case, Mary Josephine Vasquez?

A. Yes, I did.

Q. Would you describe what happened, please?

A. Miss Vasquez was in the Customs clearance area in line to be cleared by the inspector. I noticed that she had a bulge on her person—the upper right torso of her body.

While she was being processed by Inspector McCulloch, Inspector McCulloch drew my attention—

MR. SHERMAN: Excuse me. May I request that the other witnesses be excused during this witness' testimony? They can remain out in the hallway.

THE COURT: Very well. If those who are going to testify in this case will leave the courtroom until called, please.

(All prospective witnesses left the courtroom.)

THE COURT: Has the claimant got any witnesses?
MR. SHERMAN: No, your Honor.

BY MR. WILSON:

Q. Mr. Cornish, will you pick up where you were, please?

A. Yes.

[32] Inspector McCulloch brought my attention that Miss Vasquez was in our lookout or attention machine

for possible narcotic involvement, and I took the information. I advised him that I had already planned to send Ms. Vasquez in for a personal search, because I did notice the unusual bulge on her person.

Q. What happened next?

A. Then I made arrangements for Inspector Courtney, and one other Customs persons, a female, to conduct a personal search of Ms. Vasquez, after Inspector McCulloch had processed and cleared her through customs.

After Inspector McCulloch did clear her, she was escorted to the search room. A personal search was conducted.

Inspector Courtney shortly after came out of the room and apprised me of the latter, the situation that there was a large amount of currency on her person—Ms. Vasquez.

The search was completed. Miss Vasquez was then escorted to the office, which is close by and certain paperwork had to be done by Inspector McCulloch and Inspector McCulloch and Inspector Courtney. This was done.

Q. When you first saw Miss Vasquez, this was prior to the time she had approached Inspector McCulloch for a preliminary examination?

A. Yes, sir.

[33] Q. You, at that time, observed the bulge on her body; that is what gave you some suspicion. Is that correct?

A. Yes.

Q. And you had already decided that at that point, to have a personal search conducted of Miss Vasquez?

A. Yes.

Q. Did you have anything to do with the search itself?

A. No, I did not.

Q. Did you have anything to do with the actual search of the money, yourself?

A. No, I didn't.

Q. Were you present during any examination of Miss Vasquez by any Customs official?

A. No.

MR. WILSON: I have no additional questions at this time, your Honor.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q. Mr. Cornish, there are certain forms that are kept by the U.S. Customs at the airport for persons to fill out if they have more than $5,000 in their possession?

A. Yes, sir.

[34] Q. These are forms that are given to the persons if they wish to file them. Is that correct?

A. Yes, sir.

Q. These are not forms that are lying on a table or anything of that nature, are they?

A. Well, all of our forms are put away in ordinary fashion.

Q. I mean, they are in somebody's office?

A. Yes, sir.

Q. They are not accessible to the public, for instance, as she gets off the airplane or in plain view?

A. That is right.

Q. After the $5,000—or more than $5,000 was taken from Miss Vasquez, was she told that she could have an opportunity to fill out a form under Section 1101?

A. I didn't give her that opportunity.

Q. Did anybody, to your knowledge, give her that opportunity?

A. No.

Q. To your knowledge, did anybody explain to her that she was required to fill such a form out?

A. Verbally, no.

Q. And in any other way?

A. The written declaration has a special blank on it [35] asking about currency.

Q. So, of course, you did not know if she had read that form? You did not personally see her read the form?

A. No. I saw the form that she signed.

Q. In other words, in your presence nobody ever told her that she either had to file such a form or give her an opportunity to file such a form. Is that correct?

A. That is correct.

Q. She was not arrested at the airport, was she?

A. She was not told she was arrested.

Q. She was permitted to leave, was she not?

A. Yes, she was.

Q. So, she was never placed under arrest?

THE COURT: At that time?

THE WITNESS: At that time, no.

BY MR. SHERMAN:

Q. In fact, she was not placed under arrest, to your knowledge, until almost ten months later?

A. Correct.

MR. SHERMAN: Thank you.

MR. WILSON: No further direct, your Honor.

THE COURT: All right. You may step down.

May this witness be excused?

MR. WILSON: One other formality, your Honor, we [36] may be able to take care of at this point. We have stipulated that Plaintiff's Exhibits 1 through 7, with the exception of Exhibit No. 5, which we are withdrawing, may be admitted.

THE COURT: Very well. They may be admitted.

THE CLERK: So marked.

MR. SHERMAN: That does not include the arrest records?

MR. WILSON: That is correct. That is No. 5.

THE COURT: Those are Exhibits 1, 2, 3, 4, 6 and 7. All right.

(Plaintiff's Exhibits 1, 2, 3, 4, 6 and 7 were received into evidence.)

THE COURT: All right. We will adjourn then until tomorrow morning.

MR. SHERMAN: Your Honor, may I ask the Court a question to see what work I have to do tonight?

THE COURT: Yes.

MR. SHERMAN: In an affidavit prepared by Ms. Pompeo, she states that she—

MR. WILSON: If I may interrupt for just a moment, your Honor. Could I inquire as to what time we will start tomorrow?

THE COURT: 9:30.

MR. WILSON: May I have just a moment?

[37] THE COURT: Yes.

(Brief pause.)

MR. SHERMAN: As I was stating, in an affidavit prepared by Ms. Pompeo, it states that in October of 1975, she called my office and left a message, and I did not return her call; that she talked to me on the 13th of November and asked for an interview with my client; that I said that I would not permit it unless I was present; and she was too busy to drive to Beverly Hills, or me to San Pedro.

The next call is March 2nd, 1976, and she said "May I interview your client?" and I said "Okay." I was in trial in Los Angeles and she came up and interviewed Miss Vasquez with me on the 5th of March.

Now, first of all, I don't know how the Court feels about the government's claim that the delay is somehow my fault because I said I would not permit her to be interviewed unless I was present. Then the government proceeded to wait four months before they called me back again, between the 13th of November and the 2nd of March, and within three days of calling me back and coming up to Los Angeles, I let her be interviewed. I suppose that if, in fact, it is true what happened in October and November, she said I was too busy to drive down to Long Beach. Whose burden is it to drive? I don't know.

If the government is saying that they are trying [38] to process the thing and, yet, they don't want to drive 25 miles to Los Angeles—assuming that I said this—I don't know whose fault that would be. It also puts me in a position, since I never researched whether or not she did call me on the 27th, 28th or 29th of October. I don't have any personal memory of the call, and I am not saying it did not happen, or that I don't know—I don't know if I received the message or did not receive the message.

But I guess it places me in the position, of potentially being a witness in this case. I know that the Canon of Ethics require me to bring that to the attention of the Court, since I am also the attorney. And I suppose that you know, I am potentially a witness in this case. I want to be sure that the Court finds no problem in that.

THE COURT: I don't think that there would be any problem, as far as I am concerned. I think I can permit you to testify.

MR. SHERMAN: The second thing is, can the Court give us some indication, assuming that this is the testimony—and I assume that we can both agree that this is going to be the testimony since it is in the affidavit—as to whose burden it is under this situation to drive?

THE COURT: I do not know that there is—

MR. SHERMAN: If that is a reason for them not bringing this document, because I don't want my client to be [39] interviewed unless I am present, and it takes four months before they call me back to arrange that, I mean—I have never heard that as being a reason for not indicting someone because the attorney in Los Angeles and the investigator is in San Pedro.

THE COURT: I think we have got to review this thing with some degree of reasonableness, and the first thing is that the government has to proceed with reasonable promptness.

Now, reasonable promptness. What is that? You cannot sit around forever. You have got to move and move

fairly rapidly. You may be within your rights to say you do not want your client interviewed without your being present. That throws an element into the picture.

I don't know who has got the burden of going where. It is a matter of—I can't decide these things. We just have to put all these things in the pot, stir them a bit, and the Court is going to have to say, well, under all the circumstances the delay was reasonable, or under the circumstances the delay was not unreasonable.

Now, I don't know. I can't give you a measure, any yardstick much beyond that. And I think since you are contending that it was unreasonable delay, then we have to take evidence and tell me what it is. I have to make a reasonable judgment here. That is about as much as I can tell [40] you.

MR. SHERMAN: That is going to be the extent of the evidence, I believe.

THE COURT: I do not know. The government may have more or less.

MR. SHERMAN: Maybe, Mr. Wilson, we can research this tonight or not. Is there going to be any other—

MR. WILSON: I really don't know what counsel wants me to do. I can't testify on behalf of Ms. Pompeo. He has the affidavit that was prepared as part of the motion—opposition of motion for summary judgment. He had an opportunity to take her deposition.

THE COURT: Do you want to stipulate that that would be your testimony and submit it on that?

MR. WILSON: What? On the affidavit?

THE COURT: Yes.

MR. WILSON: I don't believe that the affidavit is complete. I would not want to stipulate that that would be sufficient.

THE COURT: You say you had another issue that I indicated we might take some testimony on, that is, whether or not she knowingly—just what was your point there?

MR. SHERMAN: The testimony at the criminal trial was that she was intoxicated. The form talks about, in my opinion, the reasonable interpretation talks about money [41] acquired abroad, and it was her testimony at the trial that she was read the form by the person that was with her, and that she understood the form to mean, or she at least thought, based upon the form and just her common sense, that she only had to report the $5,000 if she was bringing money into the country from another country.

Now, the defense at the criminal trial, and the defense here, will be that she took the money with her from the United States into Canada, and then brought this same money back and didn't realize that she had to report it.

THE COURT: Did she report it in Canada?

MR. SHERMAN: You mean out of the United States? Since that was not a charge, that was never litigated, that particular question.

THE COURT: You want the Court to determine whether under all the circumstances the Court feels justified in finding that the defendant knew that she had the $8,000 on her?

MR. SHERMAN: I do not think there is any question that she knew that she had more than $5,000 on her. The question is: Did she know that that was a requirement for her to report, assuming that she was under a reasonable belief, and this money was not acquired abroad.

THE COURT: Did you—here you are again, [42] ignorance of the law is no excuse. Have you run up against that?

MR. SHERMAN: Well, it is not so much ignorance of the law is no excuse. If you read the form, I think a reasonable person would be led to believe, by the government's own documentation, that it only applies to money acquired abroad, and Judge Hauk, himself, at the

criminal trial, says that is what he thought. This is on the record. He said that is what he thought. He thought it was only money that you brought in, not the money that you took out and bringing back. So, I don't know.

THE COURT: We justices sometimes are ignorant of the law, too.

MR. SHERMAN: I mean, does the Court feel that there is any requirement that she have some knowledge as to what she is supposed to do, or if she is misled by the government forms that that is an excuse?

THE COURT: I think if she was misled by the government's form, that might be one thing. If there is a place in the form for her to state the amount of money she has, I take it, didn't it state that she had eleven hundred, or something?

MR. SHERMAN: No. She didn't claim—

THE COURT: She did not answer that particular part of the declaration at all?

[43] MR. SHERMAN: The particular form which, by the way, was not in her handwriting, that was testified at the trial. "Are you carrying more than $5,000?"

There she answers, "No." And she testified that in answering the question that was read to her by her co-passenger, who read the whole form, that they talked about whether or not she had to report the money, because it was money acquired abroad, and she figured that it wasn't necessary because it wasn't money acquired abroad.

Now, whether this is true or false, I suppose the trier of fact will have to determine that. Obviously, some trier of fact, based on the criminal standards—well—

THE COURT: As measured against the fact that she had secreted it on her body?

MR. SHERMAN: I think it was in her—in her bra.

THE COURT: That is what I understood. I cannot decide the thing until we are ready to have me decide it, and I cannot. I am not ready to decide it until you

tell me what the evidence is, or put on the evidence. Put it in a position where I can make a decision.

MR. SHERMAN: I am just indicating to you that it is a question of fact that we will have to graple with tomorrow.

THE COURT: Very well. We will adjourn until 9:30 tomorrow morning.

(Evening recess until January 18, 1978.)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JESSE W. CURTIS, SENIOR JUDGE PRESIDING

No. CV 77-1055-JWC

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY ($8.850) IN UNITED STATES CURRENCY, DEFENDANT

vs.

MARY JOSEPHINE VASQUEZ, CLAIMANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

PLACE: Los Angeles, California

DATE: Wednesday, January 18, 1978

DELIA C. SAY, RPR-CSR No. 2171
Official Reporter

APPEARANCES:

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[46] LOS ANGELES, CALIFORNIA
WEDNESDAY, JANUARY 18, 1978; 9:30 A.M.

THE CLERK: No. 1 on the calendar, 77-1055-JWC. United States of America vs. Eight Thousand Eight Hundred Fifty Dollars. Both counsel are present, your Honor.

THE COURT: Very well.

MR. WILSON: Your Honor, unless the Court has some objection, I am going to call Ms. Pompeo. She is the case agent. She is knowledgeable of the fact that the currency was seized and the time the indictment was called.

THE COURT: Very well.

JANET POMPEO,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: State your full name and spell the last for the record.

THE WITNESS: Janet Pompeo. P-o-m-p-e-o.

DIRECT EXAMINATION

BY MR. WILSON:

Q. By whom are you employed?

A. U.S. Customs.

Q. What is your occupation in the U.S. Customs [47] Service?

A. I am a special agent.

Q. Will you give us some description of what your duties entail as a special agent?

A. Yes. Briefly, we are charged with investigating violations of the customs law, which would result in indictments and/or civil proceedings.

Q. Are you familiar with the seizure of currency from Mary Vasquez on September 10, 1975?

A. Yes, I am.

Q. How did you become aware of this particular case?

A. I first became aware of it on October 10, when I received a case assignment slip in a manila folder and petition for Mr. Sherman saying that the money had been seized, and he was petitioning for its return.

Q. Will it assist you in your testimony if you had a copy of your affidavit that you prepared for this office in connection with an opposition of motion for summary judgment?

A. Yes.

MR. WILSON: May I have the witness shown her affidavit, your Honor.

THE COURT: Yes.

THE CLERK: Is it marked as an exhibit?

MR. WILSON: No, it is not. Unless the Court has [48] some objection, I intend to sketch out the various time periods so the time could be graphically seen.

Q. Ms. Pompeo, you said that you first received knowledge of the case on October 10, or thereabouts, when you received a request to investigate a petition for mitigation or remission. Is that correct?

A. Yes, that is correct.

Q. And what—

A. I am sorry. This is October 20th.

Q. October 20th?

A. Right. Mary came through the airport on September 10, and I received it on October 20.

Q. You received the request from somebody in customs to conduct investigation?

A. Yes, that is correct.

Q. Is this rather routine, done with some frequency?

A. Yes.

Q. What was the first thing you did?

A. I reviewed the petition and read that, arranged to talk to the Customs people at the airport, who were present at the time the violation occurred. That would be Inspector McCulloch and Inspector Courtney.

Q. Is that a rather routine procedure to follow on a petition for mitigation or remission?

[49] A. Yes.

Q. What was the next thing to do?

A. After reviewing that and discussing it with my supervisor, we felt that the elements were present for a possible indictment of Miss Vasquez for the currency violation; that caused a separate file to be opened. The reason we use two separate files is because we assign types of cases numbers which are then reported to a computer, and we report our time and the number of hours we work against those particular numbers.

Q. So, one case file would be then related to the petition for mitigation or remission, and the separate file that you caused to be open would be related to a potential criminal violation. Is that correct?

A. Yes, that's correct.

Q. Do you recall approximately when you opened that particular criminal file?

A. It was approximately one to two weeks after October 20th.

Q. We can say some time in early November then of 1975?

A. Yes.

Q. November 5, is that an approximate date?

A. Yes, that would be an approximate date.

[50] Q. You indicated you made this decision in conjunction with your discussions with your supervisor. Is that correct?

A. Yes.

Q. What did you do next?

A. Right around this period of time I contacted Mr. Sherman in an attempt to interview Miss Vasquez.

Q. Do you recall the dates of those phone calls? And you might refer to that affidavit for those specific dates.

A. October 27, 28, 29, I have noted.

Q. Okay. So, and shortly before the time you opened the criminal file, you began making calls to Mr. Sherman to arrange an interview with the claimant. Is that correct?

A. Yes.

Q. Is that a rather routine procedure also to interview the claimant?

A. Yes, it is.

Q. Did anybody make a specific request to you that you do that?

A. Not at that point in time.

Q. So, it was October 28, or 29, and—

A. 27, 28 and 29.

[51] Q. What happened; what resulted from those telephone calls to Mr. Sherman?

A. I wasn't able to make contact with Mr. Sherman. He was away and did not return my call.

Q. What did you do next? Do you recall if you had an occasion to talk to Mr. Sherman at some later date, then? You may refer to your affidavit.

A. Yes, I did talk to Mr. Sherman on November 13.

Q. What resulted from that conversation?

A. We were unable to get together for an appointment.

Q. Why was that?

A. Mr. Sherman said he was quite busy, at that particular time.

Q. Yes? Did he indicate that he would not allow Miss Vasquez to be interviewed unless he was present?

A. Yes, he did.

Q. Did you make any definite time then for an interview with the claimant resulting from this November 13th telephone call?

A. No. As I recall, after that conversation, we said that when he had some free time, and I had some free

time, that we would each try to get in touch with each other.

Q. What other investigation were you doing with either of these particular case files, either the criminal [52] case file or the petition for remission or mitigation?

A. At that time I had received a copy of Mrs. Vasquez' criminal case, his file from the California Bureau of Identification and Investigation; that indicated that she had been arrested in 1971, I believe, on some narcotics investigation.

Q. So, you would have made a request then from the California Bureau of Identification for a copy of her arrest record. Is that correct?

A. Yes.

Q. Do you recall about when you would have made that request?

A. It would have been shortly after the case was opened we do this as a matter of routine.

Q. Then, you say some time in mid-November you received a copy of this report back. Is that correct?

A. Yes.

Q. What did you do then?

A. At that point, I contacted the Montebello Police Department.

Q. Why did you do that?

A. For two reasons. One, since we were anticipating possible indictment of Mrs. Vasquez, I wanted to be sure that we were not stumbling into— if you will—an [53] investigation that they might be working on.

Q. Why did you think that the Montebello Police may be working on some sort of investigation?

A. I knew that the Vasquez family had been involved in pretty extensive heroin dealing activities, and felt that they probably were still involved in those activities.

Q. So, this would have been some time in mid-November. Is that right?

A. Yes.

Q. Let us say November 15, just for purposes of illustration. Did you have an occasion to contact any other law enforcement agency?

A. Yes. Some time after I contacted Montebello, I guess it would be a week or something like that, I contacted our office in Blaine, Washington. Oh, let me back up, please.

When I talked to Montebello, and some time before that, I felt that the transaction of money may have been a result of narcotics transaction that had been taking place by the Vasquez family, perhaps in Canada.

When I contacted Montebello, they said that they also suspected that the Vasquez family was now selling narcotics in Canada.

Then that caused me to call our resident agent [54] in Blaine to contact the RCMP to see if we could establish that the trip had been made for the purpose of selling narcotics.

Okay. My purpose in doing this, the currency reporting department and the violation of that is a misdemeanor. It is a felony, however, if it is a part of an ongoing criminal activity.

Q. Yes? So, then, you suspected that the incident that occurred on September 10, 1975, may be part of some other criminal violation. Is that correct?

A. Yes.

Q. And, you felt it was your duty to investigate all the facts surrounding the importation on September 10, 1975, with the defendant currency in this case?

A. Yes.

Q. What did you do next?

A. Umm—okay. About this time—because it was shortly before Christmas—I prepared a draft of the criminal case report to submit to the United States Attorney. Okay. At that time, it was not as complete as I would normally have it, but I wanted to get the ball rolling. And my supervisor felt that rather than submitting a partial preliminary report to the United States

Attorney, that I should wait until I had all the facts reported to me, and then make one complete [55] report.

Q. So, this would have been in late November of 1975?

A. By the time I drafted it and had it, you know, back from the typing, it was possibly—it was late November or—no. I would say it would be even in December. Our typing pool takes three weeks.

Q. So, let us say December 5 you had a preliminary report, then, for the United States Attorney's office. Is that correct?

A. Yes.

Q. And, your supervisor said hold off on it until you had received responses from Montebello and Blaine?

A. And he also requested that I interview Mary before making a complete report.

Q. All right. When did you receive responses to your request for investigation from both Montebello and from Blaine?

A. Okay. Well, during this time, I was in contact with the different agencies, exchanging information, and ideas, quite a few times. I didn't get the final reports until some time after Christmas.

Q. Do you recall about when that would have been? You might want to refer to your affidavit so you can refresh your recollection.

[56] A. April of 1976.

Q. That would have been a final report? You were receiving more or less status reports in between?

A. Yes. They were verbal. I never did receive any written reports from them.

Q. So, you were in contact with the other law enforcement agencies by telephone, and they advised you, then, that they were still investigating—

MR. SHERMAN: Excuse me. Your Honor, I think that the questions are leading and suggestive; however, if they are going to make a claim that some information was received in April of 1976 regarding a continuing

investigation, I would like copies of her reports that contain that information.

I think, under the Jencks Act, in any event, I would be entitled to any report in this regard. And, I have never seen any reports.

To save some time, I wonder if I could see some now and look at them while the witness is being questioned?

MR. WILSON: I believe the witness' testimony was that she never received any written reports, but it was all telephone information.

MR. SHERMAN: Apparently, she must have written it down somewhere.

[57] THE COURT: Well, there hasn't been any indication that she is testifying from them. If she is not testifying from them—

MR. SHERMAN: She prepared an affidavit, your Honor, back in July of 1977, which she is reading from, which was, apparently, prepared based upon a case report.

THE COURT: And, you have that affidavit?

MR. SHERMAN: I have the affidavit. And, I would like to see the case report upon which the affidavit was based.

THE COURT: You say, "apparently." Was there a case report or is there a case report?

THE WITNESS: Yes. The case report is the one that was submitted to the United States' Attorney that led to the indictment.

THE COURT: That was a result of your work and you're not testifying here from that, I take it? You gathered this information which you got over the telephone, and together put it into a record, which you sent to the United States Attorney?

THE WITNESS: Yes.

THE COURT: Is there a copy of it here?

MR. WILSON: I believe that the criminal case report was turned over to the claimant during the criminal trial, unless I am mistaken.

[58] THE COURT: Anyway, we are not so concerned with what it contains as the date upon which it was received. We are talking here not about its contents justification. All we are talking about is when did these events occur in order to determine whether the action against the defendant was timely.

MR. SHERMAN: My concern is, your Honor if, for instance, the witness had called the Montebello Police Department in late October or November, and said: "Do you know anything about Mary Vasquez?" and she, six months later, gets a call back and says, "We don't know anything." If that is the kind of six months' delay we are talking about—

THE COURT: We have not been talking about six months' delay, anyway. We are talking about three or four months' delay.

MR. SHERMAN: Between November and April? Or, October or April?

THE COURT: No. From December 5 until April. That is the period that she said she was receiving additional reports.

MR. SHERMAN: What I am wondering, if she really did receive additional reports, I don't believe that she received any additional information. I don't think there was any information received.

[59] THE COURT: Do you have any reports which would indicate whether you did or did not receive any reports from Montebello Police, and other law enforcement agencies, during this period? Did you keep records of your telephone calls?

THE WITNESS: I kept notes of the officers' names that I spoke to, and their telephone numbers, obviously, so I wouldn't have to find them again.

THE COURT: Were they related to the dates upon which the calls were made? Would those reports show when you received the information or when you got the calls?

THE WITNESS: They probably would not show each call that I received.

THE COURT: Would they show any calls that you received?

THE WITNESS: They would show the first call that I made. Umm—I talked to them quite a bit over the period of time.

THE COURT: The reports are not here, I take it?

MR. WILSON: No, your Honor.

THE COURT: You are going to have to proceed without them, I guess, counsel.

MR. SHERMAN: May I ask the witness where the reports are?

THE WITNESS: There were no written reports that [60] I received from Montebello or from the offices, that I know of.

MR. SHERMAN: Excuse me. I am talking about the notes that you made of your conversations, that you made with other persons.

MR. WILSON: I think, your Honor, we can clear this up with perhaps one question relating to these other contacts with other law enforcement agencies.

THE COURT: All right.

MR. WILSON: Then, perhaps Mr. Sherman can go on cross-examination if he desires.

THE COURT: Very well.

BY MR. WILSON:

Q. What was the result of your contact with other law enforcement agencies; was anything given to you that caused you to do any further investigation?

A. No. The efforts of Montebello and the RCMP, and Blaine, did not result in any information that could be used to show an ongoing criminal activity.

Q. Did you put this information into either the criminal case report to the United States Attorney's office, or

in the report to the District Director of Customs for the petition for remission or mitigation?

A. Not per se, because it was basically negative [61] reports. The information that I did use was identification of people and some of their criminal history.

Q. So that it was a lead you developed early on in the case that turned out to be negative and there was no reason then to put it in the report?

MR. SHERMAN: Your Honor, excuse me. I will object to saying "a lead." There was no lead. What she was doing, she went on a fishing expedition to call the Montebello Police Department, what they knew about Mary Vasquez and, apparently, they did not respond back that they knew anything. That is not any kind of a lead.

THE COURT: Whatever it is called, I take it from her testimony that it was not that simple. She received a number of telephone calls over a period of time.

MR. SHERMAN: Well, she says that. I would like to see the reports to see if that is so.

THE COURT: Do you have that report in your possession, any such report of your telephone calls with them?

THE WITNESS: No, I don't believe it is written down. They gave me—

THE COURT: In any event, you have not referred or refreshed your memory from any such report in order to testify here today?

[62] THE WITNESS: What I can remember from this—

THE COURT: You are basing your testimony on the recollection that you have from the affidavit. Is that what you mean?

THE WITNESS: Yes.

THE COURT: You say "this." You mean the affidavit?

THE WITNESS: Yes.

MR. SHERMAN: Your Honor, the affidavit had to be prepared, I take it, from something. Can't I see the case report?

THE COURT: Let us finish the direct examination and we can take it up on cross-examination.

BY MR. WILSON:

Q. So, in April of 1976, you received what amounted to a negative response from the other law enforcement agencies; is that correct?

A. That is right. Yes, negative—yes, negative in the—for evidence of the ongoing criminal activity that I thought might be taking place.

Q. Did you have an occasion to interview Mrs. Vasquez during this period of time?

A. Yes. Mr. Sherman and Miss Vasquez, and I, and another agent from our office, Anthony Weeda, got together [65] in the courthouse here on March 5th.

Q. March 5 you did have an interview with the claimant?

A. Yes.

Q. What did you do next; was there any further investigation to be done after the interview with the claimant, and your receipt of the negative reports orally from the other law enforcement agencies?

A. No. I sent in the draft of the criminal case report for final typing.

Q. When you say you sent in a draft—

A. To the typing pool.

Q. And when you got that draft back in final form, what did you do with it?

A. I reviewed it. My supervisor reviews it, and it then goes to the office of the special agent assigned before it is mailed or carried to the United States Attorney's office.

Q. Do you know what date it was mailed or carried to the United States Attoney's office?

A. May 17th.

Q. What happened next?

A. Sometime after that I testified in front of the grand jury.

[64] Q. Did you have an occasion between the time you forwarded the report to the U.S. Attorney's office and you testified before the grand jury, did you do anything else with the case?

A. I'm sorry?

Q. Did you have an occasion to do anything in between the time the case report was referred to the U.S. Attorney's office on May 17, 1976, and the time you testified before the grand jury?

A. The Assistant United States Attorney asked that I recontact and reinterview the witnesses from Customs.

Q. You say the United States Attorney? Do you recall who it was?

A. George King.

Q. Do you recall what his function was with regard to this particular case?

A. He was in the complaint section of the United States Attorney's office.

Q. Do you recall when that request came from Mr. King to reinterview any of the witnesses?

A. June 9.

Q. Did you, in fact, interview any of the witnesses?

A. Yes, I did.

Q. What did you do next?

[65] A. Reported my findings to the Assistant U.S. Attorney King.

Q. Yes?

A. And on June 15, I presented the case to the grand jury.

Q. When you say you presented the case to the grand jury, what do you mean by that?

A. I explained the facts of the case, as I knew, to the grand jury.

THE COURT: You testified before them, did you not?

THE WITNESS: Um-hmm.

BY MR. WILSON:

Q. Did you have an occasion to go to the airport in the location where this currency was seized any time around September 10, 1975?

A. Yes; I had gone to the airport on another unrelated case.

Q. Did you have an occasion to observe the physical surroundings?

A. Yes.

MR. WILSON: May I have the witness shown Plaintiff's Exhibit No. 4?

THE CLERK: Plaintiff's Exhibit No. 4 in evidence [66] before the witness.

BY MR. WILSON:

Q. Do you recognize this exhibit, Ms. Pompeo?

A. Yes, I do.

Q. Would you describe to the Court what it is?

A. It is a photocopy in reduced form of a poster that is published by Customs that we use to post in the passenger arrival areas to notify people of the reporting requirements.

Q. About what size is this poster?

A. Probably—

THE COURT: Two feet?

THE WITNESS: Two feet by three feet.

BY MR. WILSON:

Q. Where are these posted in this particular area?

A. When I was out there, they were posted, not only in the Customs area, but also in the Immigration area, which is upstairs over the top of the Customs area.

Q. Are you familiar with the traffic flow pattern of the terminal in this area?

A. Yes. When international passengers arrive, they come down this corridor that is restricted to entry. So, they get off the plane, come down the corridors, and which directs them into the Immigration area. They must clear the [67] Immigration thing and then they get on escalators and go downstairs in the Customs area and claim their bags, and clear through Customs.

Q. And these posters are located both in the Custom area and the clearance area?

A. Yes, they were.

MR. WILSON: I have no further questions.

CROSS-EXAMINATION

BY MR. SHERMAN:

Q. Ms. Pompeo.

A. Yes.

Q. Agent Pompeo, the money was seized from Mrs. Vasquez on the 10th of September. Is that correct?

A. Yes.

Q. And, it is also correct, is it not, that the very next day, September 11, I wrote a letter to the District Director of Customs requesting action upon the seizure of the money just one day later?

A. I don't recall the date of your letter.

MR. SHERMAN: I have one copy of these, if we can have them marked, and I can substitute Xeroxed copies.

THE COURT: All right.

MR. SHERMAN: The first exhibit I would like is [67-A] a letter dated September 11, 1975, to the District Director of Customs.

THE CLERK: Defendant's Exhibit A marked for identification before the witness.

(Defendant's Exhibit A was marked for identification.)

BY MR. SHERMAN:

Q. Does that help refresh your memory, just one day after the seizure a letter was written to the District Director of Customs asking for some action upon the seizure?

A. Yes.

Q. Then, apparently, approximately a week later, the district, the acting District Director, Thomas N. Tella, wrote a letter to Mrs. Vasquez notifying her officially of the seizure, and telling her she had the right to file petition of remission, which is Section 18, which is the remission statute we talked about yesterday.

A. I don't have any personal knowledge of that.

MR. SHERMAN: May this be marked Defendant's Exhibit B?

THE COURT: Defendant's Exhibit B marked for identification.

(Defendant's Exhibit B was marked for identification.)

[68] THE WITNESS: Okay. I did see a letter on Customs Treasury letterhead from Mr. Tella to Mary Vasquez.

BY MR. SHERMAN:

Q. Then approximately one week after that, a petition for remission was filed on behalf of Mrs. Vasquez, that I believe has already been marked. Well, that is referred to in the various documents, your Honor, in the motion—I think it is already an exhibit—

THE COURT: I am sure it is.

MR. WILSON: It is not a plaintiff's exhibit, your Honor.

MR. SHERMAN: Maybe we should make it an exhibit.

THE COURT: You say it is not a plaintiff's exhibit?

MR. WILSON: No, your Honor.

BY MR. SHERMAN:

Q. I am showing the witness, your Honor, a petition for remission, which was filed by me on behalf of Mrs. Vasquez, which was dated September 25.

THE CLERK: Defendant's Exhibit C marked for identification before the witness.

(Defendant's Exhibit C was marked for identification.)

[69] BY MR. SHERMAN:

Q. You were aware, were you not, that at the time you received the assignment in this case that Mrs. Vasquez was not arrested at the airport on the 10th of December?

A. That's correct.

Q. And the only notice that she had received as a result of the seizure was that she had a right to petition for the return of the money pursuant to the petition of remission statute?

A. I have no personal knowledge of that. That is taken by the District Director's office.

Q. You have before you, which I believe is Exhibit B, a letter from the active District Director telling her she has a right to file a petition for remission.

A. Right. I don't know that, but I see that.

Q. Do you have any information, either personally or in the Customs files, that at any time Mrs. Vasquez was informed that she was under investigation for a criminal matter?

A. Not to my knowledge.

Q. After the petition for remission was filed on or about September 25, 1975 you, apparently, were assigned the case 30 days later on the 20th of October?

A. Yes.

[70] Q. And at the time you received the file, the only things you received, I take it, were copies of the letters

from me to the District Director and the notification from him to Miss Vasquez that she could file a petition for remission?

A. No. I received a copy of your petition, and possibly your letter to the District Director dated September 11th. I did not receive a copy of the letter from Mr. Tella to Mary Vasquez—that I can remember, anyway.

MR. SHERMAN: May I approach the witness for a moment, your Honor?

THE COURT: Yes.

BY MR. SHERMAN:

Q. There is one other letter that I want to refer to. Along with the petition for remission, there is a letter dated September 25, 1975, from me to the District Director. Is that correct? Did you also see that letter?

A. Yes.

MR. SHERMAN: May this be marked Exhibit D?

THE COURT: All right.

THE CLERK: Exhibit D marked for identification.

(Defendant's Exhibit D was marked for identification.)

[71] BY MR. SHERMAN:

Q. You will note that in that letter there is an explanation, is there not, by me as to why she did not report the funds?

A. Yes, there is.

Q. In addition, there is a statement by me that: "In my opinion, the remission statute"—and I am quoting from the letter—"are defective and they do not provide the standard by which the Secretary of the Treasury is to exercise his discretion, nor do they provide for judicial relief. In this regard, if the remission should be denied, I would like a detailed explanation for the reasons thereof and the standards used by the Secretary explaining his decision."

Is that correct?

A. Yes, that appears in your letter.

Q. Now, when you contacted me in November 1975, you informed me, did you not, that you were investigating the petition for remission?

A. Yes.

Q. Did you, at any time, inform me that you were also conducting a criminal investigation?

A. No, I did not.

Q. Did you, at any time, prior to the indictment [72] returned against Mrs. Vasquez, inform me that there was a criminal investigation going on?

A. No, I didn't.

Q. Did you, at all times, lead me to believe that your investigation was solely concerned with the petition for remission?

MR. WILSON: I will object to the question—

THE COURT: Sustained.

BY MR. SHERMAN:

Q. Did you feel that it was appropriate, Ms. Pompeo, that if you were investigating a criminal matter, that it was appropriate to keep this from the attorney?

MR. WILSON: I am not sure I understand the question, your Honor.

MR. SHERMAN: I will reframe it.

Q. Mrs. Pompeo, when you talked to me on the telephone and asked for an interview, you said the purpose of the interview was because you were investigating the petition for remission.

A. At the time of our meeting on March 5, I note that that statement to that effect took place.

Q. That you were investigating the petition for remission?

A. Yes.

[73] Q. In fact, you were investigating a criminal case at the same time, were you not?

A. At the same time.

Q. Did you think it was appropriate to tell an attorney that you were investigating a civil case, while at the same time you were investigating a criminal case, and trying to get incriminating evidence?

A. No.

Q. You feel that was proper, or not proper?

A. I do not see anything wrong with it.

Q. You do not feel that you were misleading the attorney, at any time?

A. No.

THE COURT: Well, in any event, counsel, that would be a matter which would affect the criminal prosecution, not this.

MR. SHERMAN: I think it goes to the course of conduct. Let me ask her another question.

Q. When you received the case report of the information on the 20th of October did you receive, I take it, the reports prepared by the Customs officials at the time of the seizure of the funds?

A. No. The only document I received, at that time, would be your petition and your cover letter.

[74] Q. At some time, did you receive any written reports from the officials who made the seizure on the 10th of September?

A. No.

Q. Did you ever interview those persons?

A. Yes.

Q. When did that take place?

A. Some time shortly after I received them, the report after—shortly after October 20th.

Q. Some time by the end of October, you interviewed the witnesses at LAX?

A. Yes.

Q. Did you make a written report of your interview with them?

A. Yes.

Q. Other than the period after June 9, when you apparently were asked to reinterview some witnesses, did

you do anything with the witnesses at LAX, say, the end of October and the 9th of June?

A. No.

Q. So, would it be fair to say that by the end of October you had received sufficient information from the witnesses at LAX to initiate a criminal prosecution?

THE COURT: I do not think your question states [75] what you mean. She did not initiate any criminal prosecution.

BY MR. SHERMAN:

Q. By the end of October, you had learned pretty much all the facts, had you not, as to what had occurred at LAX at the time of the seizure?

A. Yes. I learned what had occurred at LAX.

Q. Between that time and the date that the indictments were returned, or the indictment was returned in this case, did you learn any additional information as to what occurred at the Los Angeles International Airport?

A. No.

Q. So, all of the facts as to what occurred at L.A. International were in your possession by the end of October, 1975?

A. Yes.

Q. Isn't it a fact that the only thing that happened, as far as information that you gathered, that you put into a case report between the end of October, and your testimony before the grand jury, the 15th of June, was the interview of Mary Vasquez?

A. No, that is not all that happened.

Q. I am talking about information that you were able to put in any kind of a case report.

A. I can say that, from the information in my [76] contact with Montebello and with Blain, did not result in things that went into the criminal case report.

Q. What facts did you learn, after the end of October, other than the interview with the defendant, that were facts relating to a criminal prosecution?

A. I identified several of the associates of Mary Vasquez, some of whom were called as witnesses by you at her trial.

Q. What names of any associates did you learn after the end of October, 1975, other than what took place at the interview of Vasquez?

A. Valera and Waters.

Q. This man, Valera, he was with Mrs. Vasquez, was he not, at the time that the funds were recovered?

A. Yes, he was.

Q. So his name was known to you at LAX?

A. Yes, his particular name was known to me.

Q. What information did you receive about Mr. Valera after the end of October, 1975?

A. I learned more of his criminal history and some of the activities that he had been involved in.

Q. Do you have any reports involving Mr. Valera?

A. I didn't understand.

Q. Did you write any report regarding Mr. Valera?

[77] A. No.

Q. Did you put down anything in writing about Mr. Valera?

A. Yes.

Q. In that case report?

A. We are talking about a criminal case report?

Q. Yes. The criminal case report.

A. The criminal case report, I can't recall.

Q. In fact, you were informed, were you not, by LAX personnel—Customs personnel—that he was related to Mrs. Vasquez?

A. That is what was indicated on the Customs declaration.

Q. And that he was traveling with her at the time that the money was seized?

A. Yes.

Q. What other new information did you gather after the end of October?

A. Some information on John Waters.

Q. Where did that name come up?

A. That was on one of the documents that you supplied.

Q. That was a result of the interview in March of 1976. Is that correct? I mean, the information you got [78] regarding Mr. Waters came to you by way of a letter by me dated March 8th?

A. No; his name had come up before.

Q. What information did you gather about John Waters after the end of October?

A. That he was believed to be associated with the Vasquez heroin dealing operations; that he was Mary's son-in-law.

Q. Who gave you that information?

A. I received that by contacting LAPD, Montebello Police Department, and the California Bureau of Investigation.

Q. When did you receive that information?

A. Over a period of time.

Q. Did you write down that information, anywhere?

A. From LAPD I got a copy of a criminal case that LAPD's criminal history—from Montebello I don't recall getting any documents or anything from them. That was a verbal thing, and I don't recall when I received the criminal history on Valera from California Identification—

Q. In other words, you asked for his arrest record?

A. Yes.

Q. On both of these two individuals?

A. Yes.

Q. That normally takes how long to obtain?

[79] A. When you have the people identified CII takes, depending, three to four weeks, depending on how busy they are.

Q. You had the person identified that was traveling with Mrs. Vasquez right away, because you knew he was traveling with her on the 10th of September?

A. Yes.

Q. So, as to his name, you had that information as early as October 20th?

A. I'm not sure that we—I'm not sure that I had his date of birth at that time. I can't recall if that is on the Customs regulations or not.

Q. You were present at the criminal trial, were you not?

A. Yes.

Q. Is it fair to say that as to the evidence presented by the government at the time of the criminal trial, that all the facts presented by the government were in the government's possession, actually, the day of the seizure, September 10?

MR. WILSON: Objection, your Honor. It calls for a conclusion.

THE COURT: Sustained.

[80] BY MR. SHERMAN:

Q. You were aware of the Customs laws, obviously, regarding seizure of funds and violations of Section 1101?

A. Yes.

Q. As of the 20th of October, or let's us say within a week after that, did you feel that you had sufficient information in your possession at that time to go to the grand jury and seek an indictment?

MR. WILSON: Objection. Calls for a conclusion.

THE COURT: Sustained.

BY MR. SHERMAN:

Q. At that time, as an investigator, did you feel you had sufficient information to present the matter to a U.S. Attorney for his opinion in this regard?

MR. WILSON: Objection, your Honor.

THE COURT: Sustained.

MR. SHERMAN: Your Honor, maybe I misunderstood your ruling yesterday. I thought you were interested in the reasons for the delay. If, in fact, the government had all of the information in their possession as of the 20th day of October, sufficient to bring an indictment—

THE COURT: That is a question for me to determine. You are asking her for her opinion.

MR. SHERMAN: All right. Let's try it another [81] way, then.

Q. As of the 20th of October, you had information that Mary Vasquez had come to Los Angeles International carrying more than $8,850?

THE COURT: I do not think you understood her testimony. My understanding is that she had the names, knew the names of certain persons at that time; however, she subsequently received information which indicated that they may have a criminal connection and, as a result of that, then, she aked for a rap sheet which would—the mere fact that she may have had the names of these people at the time of the seizure or shortly thereafter, did not necessarily alert her to the necessity of getting a rap sheet. It was information she got later, so, this is a growing investigation.

MR. SHERMAN: It is a growing investigation, your Honor, that led nowhere because there was nothing to lead to.

The problem in this case is, they knew the name Mary Vasquez back in 1971. Four years earlier she had been convicted of a narcotics offense, so she spent X number of months trying to make something out of that. And there was nothing to make out of it.

The question is: Can they sit around between the date of the seizure, September 10, and the return of the [82] indictment, June 15 because they have some suspicion based on a criminal arrest record which conviction was overturned four years earlier, and think maybe there was

something more to it, without any evidence of that, and without receiving any information that there was? I think that is the issue in his case.

They had everything in their information to start a criminal prosecution the day the money was seized, September 10th; and after that date, no new information whatsoever, came to their attention. And I am trying to prove that and I would like to prove that. I would like to prove that by seeing the case report, because if we see the case report, we will be able to see that every single bit of information in her possession which led to the criminal indictment in this case was in the possession of the Customs on September 20, and not one single new fact came out at that date.

THE COURT: I don't see the materiality of that. You say "sit around." You say they are not entitled to sit around for a period of six months and get nothing. They were not sitting around. They were attempting to make a more serious case. They were trying. They suspected that she was in some way implicated in a more serious offense and they were attempting to determine what that was, and to see whether or not there was a case.

They ultimately determined, apparently, that they couldn't get any information that such was true, and they proceeded on what information they had by way back back in the beginning. But, I do not think there is anything that you can rely upon to show that they were doing nothing. Certainly, they had been active.

MR. SHERMAN: Your Honor if I could see the case report that she prepared, I am sure that I can prove to you that nothing was done; that there was maybe a telephone call to the Montebello Police Department and they said, "We don't have any information. Call the LAPD." They had no information. So, she called to the Royal Mounted Police in Canada, and they had no information, and that was it.

Now, I cannot do that unless I can see the case report.

MR. WILSON: Counsel is mischaracterizing what the witness has testified to.

THE COURT: Is there a case report?

MR. WILSON: I believe her testimony was that the case report contains only the positive information about what happened on September 10, 1975, because her other leads turned out to be negative, so there was no reason to put them in there. There was no case report summarizing all the other [84] investigation that was done, other than perhaps some notes in the jacket as to calls made. But it was basically a telephone sort of investigation that turned out negative.

I believe her testimony was that she did not anywhere summarize in writing all of the efforts that were done.

MR. SHERMAN: I would like to see if there was some summary of anything.

THE COURT: Is there a case report available?

MR. WILSON: The case report that this witness prepared for the U.S. Attorney's office, upon which the criminal indictment proceeded, there is that case report.

THE COURT: Is that available?

MR. WILSON: I am not sure if I have a copy or not.

Ms. Pompeo, did you bring a copy of that with you?

THE WITNESS: No, I did not bring a copy of the criminal report with me.

MR. WILSON: But, it is available.

THE WITNESS: Sure.

MR. SHERMAN: It is available on the 12th floor of this building, is it not?

THE WITNESS: Whenever they would keep it.

[85] MR. WILSON: We would object to producing that particular document if it was not produced as part of the criminal trial on the grounds of privilege. It is an investigators summary. It may contain law enforcement techniques, investigative techniques, and there is nothing that counsel will be able to prove if—

THE COURT: Well, that is true. I thought if it was available, in order to put it in, you have to produce it and look at it. But, the testimony so far is that it contains nothing that would be relevant here. And I think you can rely upon the fact that there isn't anything in it that would attempt to corroborate her testimony that she did all these things. She said she did, and it is otherwise uncorroborated. And I think we can almost stipulate that there is nothing in the record to indicate to the contrary.

MR. SHERMAN: May it be stipulated, then, that no new facts were gathered that were part of the case report, other than what occurred on the 10th of September?

THE COURT: You had better get that clarified a little bit more. What you want is a stipulation, I take it, would be that the case report, to which he has testified, does not contain any statement of new facts not known at the time of the seizure.

MR. SHERMAN: Would that be agreeable?

[86] MR. WILSON: I have no objection if that conforms to what the witness is testifying to, and I believe it is. I believe it should be put to the witness in the form of a question.

THE COURT: Let us ask her. Do you know whether or not this report reports to the U.S. Attorney any facts which you found after the seizure, or that you found after the case was first referred to you?

THE WITNESS: No, I don't believe it did.

THE COURT: All right.

BY MR. SHERMAN:

Q. Then, is it fair to say that all of the time that you spent in this case after the 20th of October was to follow up conjectures of yours based upon her past criminal record?

MR. WILSON: Objection, your Honor. She has already testified that she was also attempting to gain an interview with the claimant, and the characterization of what she was doing as conjecture, I believe—

THE COURT: May I have that question again, please?

(Record read.)

THE COURT: The question was read to you. Do you understand the question?

[87] THE WITNESS: I think so.

THE COURT: Can you answer it?

THE WITNESS: It would not be after October 27th. It would be after March 5.

BY MR. SHERMAN:

Q. What you did between, say, the 27th of October and the 5th of March, was try to obtain an interview with Mrs. Vasquez?

A. Yes.

Q. Apparently, we spoke on the 13th of November; is that correct?

A. Yes.

Q. And the upshot of the conversation was that if we were both free you would call me, or I would call you, about interviewing Mrs. Vasquez?

A. Yes.

Q. And for the next four months, let's say, up until around the 2nd of March, you did not call me?

A. That is true. Nor did you call me.

Q. Within three days of calling me again on the 2nd of March, I said if you wanted to come to Los Angeles you could interview Mrs. Vasquez?

A. Yes; that you were in trial and we agreed in order to get the interview done that I will come down here, and [88] the interview took place in the U.S. Attorney's interview room.

Q. Did you suggest on the 13th of November that you come up to Los Angeles that month, that day, or within a week and interview her in L.A.?

A. No. You suggested that I go to your office, at that time.

Q. Oh, I did suggest, then, in November that I would permit an earlier interview if you would come up to Los Angeles?

A. If—that you were busy and that if you would have time, that if I came down here, that you could have Mary available.

Q. And didn't I say in that conversation that I would make her available at any time if you would come up here—up to Los Angeles?

A. I don't know about "any time."

Q. But, in a reasonable—

A. You would try to have her available.

Q. And I said that during the conversation of the 13th of November?

A. Yes.

Q. Then the next time, as you have testified, that you called me was the 2nd of March?

[89] A. Yes.

MR. SHERMAN: May I have a brief moment, your Honor?

THE COURT: Yes.

(Brief pause.)

BY MR. SHERMAN:

Q. When you contacted the Montebello Police Department, did they have any knowledge whatsoever about the seizure of the funds from Mrs. Vasquez on the 10th of December?

A. No.

Q. Did you personally contact the Royal Mounted Police in Canada?

A. No, I didn't.

Q. Did you contact somebody in the office in the State of Washington?

A. Yes.

Q. At the time you contacted those persons, were they aware of the seizure of the funds in Los Angeles?

A. No.

Q. So, what other police agency did you contact, other than your office in Washington in the Montebello Police Department?

A. Los Angeles Police Department, and Los Angeles [90] Sheriffs.

Q. Did either one of those organizations, at the time you contacted them, have any knowledge of the seizure of the funds?

A. No.

Q. In essence, what you were doing in contacting these other four agencies, was to determine whether they had any information about criminal activity of Mrs. Vasquez, unrelated to the seizures of the funds?

A. No, that is not true. I was looking to accomplish—was to find witnesses, evidence, that would substantiate that Mrs. Vasquez, or members of her family, or associates, had traveled to Canada for the purpose of selling heroin.

Q. When you contacted the Montebello Police Department, they told you they had no information about her even going to Canada, did they?

A. No, they did not.

Q. What did they tell you, and who did you speak with?

A. I cannot remember the investigator's name. He was in the narcotics investigation section.

Q. Do you know when you talked to him?

A. Over several months.

[91] Q. You are saying you never made any notes of any of your conversations with him?

A. I made a note of his phone number and his name.

Q. Do you know if he did anything, or did you ask him to go out and assist you in obtaining any leads?

A. He said that he would see what he could do. We didn't discuss what he was going to do, how he was going to do it.

Q. At some time he called you back or you called him, and he told you he wasn't able to develop anything?

A. That's true.

Q. Is that true with the other agencies that you spoke with?

A. Yes.

Q. Do you know if these other agencies did any investigation at all?

A. Only what they relayed to me.

Q. What did any of the agencies relay to you, as far as what they did?

A. They didn't explain to me what they did. They explained that they weren't able to come up with things that would help me in this particular case.

Q. So, you have no idea whether they did anything or not?

[92] A. That's correct.

Q. Did you, in your own mind, believe that after reading the case at LAX you had sufficient information to take to the U.S. Attorney's office to talk about obtaining a criminal indictment?

MR. WILSON: I lost the question.

THE COURT: It is objectionable, anyway. Assuming you would have made an objection.

MR. SHERMAN: I am almost finished, your Honor, but I wonder if I can ask the Court this question: If the test is whether or not the delay was reasonable and, if in fact they had all the facts to seek an indictment as of the 10th of September, or as of the date that she received the case or interviewed the witnesses, the end of October and, at that time they had enough information what they ended up filing, which was a felony on 1001, and the misdemeanor 1101, and they had all that information in their possession at that time, and nothing ever developed thereafter that helped them in the prosecution, wouldn't that go to whether or not any delay thereafter was reasonable? If, in fact, they had to go out and get further information, that is one thing. But, if they had everything already—

THE COURT: The ultimate goal of the investigation was not a violation of 1101. The ultimate goal of the

[93] investigation was the possible implication of this claimant in a serious drug smuggling deal.

They had some reasonable ground to believe that that might have occurred and they started out, I take it, with that in mind as a result of their goal to seek as a result of this investigation. And, along the line, they failed to get anything beyond what they had in the begining, and so not being able to establish anything more serious, she came in and indicted her on 1101. Sure, they had enough facts in the beginning to indict her, and they never learned any more.

MR. SHERMAN: But, they also had enough, if they were looking for a felony, they had enough as to the date of seizure, to also prosecute her on the 1001 felony, which is, in fact, what they did. If they were looking for a felony violation, they had that information in their possession after the 10th of September.

THE COURT: I am taking it they were looking for more than a felony violation as such. They were looking for a serious drug violation to help them put an end to what they suspected was going on, and I don't think that they are foreclosed from that further investigation, or there was any reason why they were compelled to file or to seek an indictment on a lesser offense just because the facts were [94] there to support a lesser offense, at that time.

MR. SHERMAN: Would the Court agree that it is fair to state that the only information they had in their possession, which led them to believe that there might be a narcotics offense was the fact that she had a prior criminal record?

THE COURT: I think that might be enough. I take it that there is more than that, but I think that that would be enough.

I take it that not only was there a prior conviction, which you say has been set aside, or is up on appeal, or what?

MR. SHERMAN: No, it was reversed.

THE COURT: Supposedly reversed.

MR. SHERMAN: And, the case was dismissed.

THE COURT: I think that would be enough to cause some suspicion, under the circumstances, here coupled with that, I don't know what the facts were, and while it was set aside, it may have well been set aside because of some technical aspect which would lead any reasonable person to believe that she was guilty nonetheless.

Coupled with the fact that she had an unusual amount of money on her person, which she had attempted to hide, all goes together, I think, to cause a reasonable suspicion [35] that she may be involved in drug smuggling. And I don't think it is anything unusual or improper for Customs officials to suspect that that is the case and attempt to find out.

MR. SHERMAN: All right, your Honor. The letter that I wrote to Customs, within eight days of the seizure, explains the total defense as to why she did not declare the money.

THE COURT: That is her position.

MR. SHERMAN: Yes. Her position was explained to Customs within eight days of the seizure.

THE COURT: There is no reason for Customs to believe it.

MR. SHERMAN: Fine. No reason for Customs to believe it. Apparently, the only thing that was done after that time was to look into the narcotics activity, was for Mrs. Pompeo to call three or four police agencies and say, well, what do you know about this situation?

THE COURT: Are we through with the examination of this witness?

MR. SHERMAN: Let me just ask this one other question.

Q. Is it fair to say, Mrs. Pompeo, that what you preliminarily did, in this case, was to try to verify your suspicion was to call various police agencies to see what

[96] information they had about any narcotics activity for Mrs. Vasquez?

A. That would help in making—in the case I felt was fair.

Q. That is primarily what you did?

A. Yes.

Q. And those calls, those three or four calls to various police agencies, were they made all in the month of October or November?

MR. WILSON: Objection, your Honor. It is not the testimony of the witness that there were just three or four calls and they were made in the month of October.

MR. SHERMAN: I am asking the question.

Q. Do you remember what months you made those calls to the various police agencies? Was that done early in your investigation?

A. It was done from November 15th through after Christmas.

Q. By the end of December, you had made your calls to these various police agencies?

A. By the end of December? No. It was past Christmas.

MR. SHERMAN: All right. I have no other questions.

[97] MR. WILSON: I have nothing further on redirect, your Honor.

THE COURT: Thank you. You may step down.

MR. SHERMAN: Now, if we could have just a little colloquy, your Honor.

I am confused because I do not understand what I can prove or what the burdens are here.

THE COURT: Let me take off for a moment. These forfeiture statutes are very severe, and they are harsh, and judges don't like them. Yet, we are called upon to enforce them. We do not like them because so often the result is much more harsh than the normal penalty that would be imposed in a case.

In this case, she was found guilty of a felony—

MR. WILSON: It is the other way around.

THE COURT: She was found guilty of a felony and not guilty of a misdemeanor.

If she had been found guilty of a misdemeanor, the offense which brings on this forfeiture, the maximum sentence which a Court could impose would be far greater than the result of the forfeiture.

So, as I say, we do not like to enforce these things, but we are compelled to do so.

I have a personal feeling, too, that it makes [98] harsh remedy even harsher when this kind of a potential penalty is hanging over the defendant or a claimant for a long period of time; and, therefore, I think it is incumbent upon the government to proceed with all reasonable diligence to process the claim.

Now, when I say "all reasonable diligence," we have got to be reasonable about the thing, and we have got to consider the government's position. These government employees need the responsibility and duty to, and I have been anxious to see in this case whether there has been a lot of dilitory conduct that the government has really not done what it should do in order to push this thing with all reasonable speed, and, frankly, I don't see any point in which the government has been lax.

If I had found such, and I found it an unreasonable length of time, I would have been happy to so hold, because I don't like these forfeiture statutes. And, most judges do not, for the reasons I have indicated.

But, in view of the evidence here, I just cannot see any way in which this Court can say that the government has not pursued their claim in all reasonable diligence.

MR. SHERMAN: Your Honor, what was done in this case? Let us see what was done.

THE COURT: I'll tell you what was done.

MR. SHERMAN: Yes?

[99] THE COURT: There was an offense. And, within the first week—well, as a matter of fact, within the first few days, the government had all the informa-

tion which they needed to indict the defendant for violation under 1001 or 1101.

MR. SHERMAN: And, 1001.

THE COURT: 1001. And they could have indicted then, but, as I understood a few moments ago, there was also reasonable ground to suspect that a much more serious offense had been committed, taking all the facts and circumstances necessary into account, and that being true, the government is not required to indict right off on the basis of some offense when a large offense might well be involved. And that is one of the discretions a prosecutor has to know when it is the proper time, when he has got all the information he needs, and what kind of a claim he thinks he can prosecute on.

When they started in, they probably thought this might develop into a large drug smuggling operation.

MR. SHERMAN: Your Honor—

THE COURT: And they want to prove it and when they found out that they couldn't, and when it became apparent that there was no further evidence, then it was referred to the government's attorney, and an indictment filed.

MR. SHERMAN: Your Honor, the only basis, other [100] than the seizure of the funds themselves, that this was anything more than what appeared to be, was the fact that she had a criminal record. And, what they did, they placed calls to various agencies, and said: Do you have any various information? And the agency said no. This agent has no idea if any of these people that she called did anything to investigate this case. She didn't personally investigate anything.

THE COURT: You know very well that if you were in her position and you called the Chief of Police in Los Angeles, and you are a narcotics agent, and all you said is: Do you know anything about this woman? Well, probably they would say no, but we'll check. And they come back and they say, well, we will have to check certain records, and we are not certain. We will check

again. You are not going to conduct the investigation. You are going to rely on them to tell you what they have done, and what they are doing. She did the same thing. She is not required to go out and make that investigation.

MR. SHERMAN: Then, there would be no way that you can ever say that delays are unreasonable.

THE COURT: Oh, certainly you can. We have had several cases in which the government does nothing. Those are the cases in which we deny relief.

MR. SHERMAN: Let me ask you—

[101] THE COURT: Does nothing for a year. 14 months does nothing, and where some prejudice occurs.

In the case I had most recently, it was a case, an automobile case, where they seized the car which is subject to loan, and they wouldn't decide it. In the meantime, the claimant kept making his monthly payments to the bank, and the government wouldn't determine whether or not they were going to forfeit it or not, or whether his claim for remission is going to prove or not. And, they kept this up for 11 months.

In the meantime, the poor claimant was making payments on it. I just felt that, in that case,—and they gave no reason for it. In that kind of a case, I can understand why. The case was never appealed, so I don't know what the Circuit was thinking, but I think the government was not entitled to proceed with his forfeiture, and I say that, but in this case, I can't see that.

MR. SHERMAN: And the Court is not influenced by the fact that, apparently, I had not even read this, but that Miss Pompeo did, that I told her on the 13th of November, I told her if she wanted to come up and interview with the witness in my office, it was fine. Why should they be able to sit around for four months because she does not want to drive to Los Angeles? She is the one conducting the investigation. Obviously, I have no burden to travel down [102] there to make her available. Particularly in this case, where they are, obviously,

trying to mislead the attorney by saying that it is a civil investigation, when they are conducting a criminal investigation in the background. That alone sounds rather—

THE COURT: I do not think this comes of any great importance, because it fits in with the fact they are otherwise making a criminal investigation.

Now, if there were nothing else in the picture between October and June, except the failure to have an interview, it might have some importance, but I do not think it does because, as I say, it just fits in with their other program. It really hasn't delayed anything very much.

If it got down to you know, to where they really needed it and they called you and they had an interview—

MR. SHERMAN: Your Honor, she made some phone calls to some police agencies and said: What do you have? And months later they called back and they say nothing. And you are saying that is active investigation? Particularly since this whole process took a year and a half?

THE COURT: I find that the delay was a reasonable delay and that the judgment of forfeiture shall issue.

MR. SHERMAN: Are we going to go on with some other evidence so the record will be complete?

MR. WILSON: Unless counsel is willing to [103] stipulate to what these witnesses would testify to.

THE COURT: I was assuming that we were proceeding on that assumption.

MR. SHERMAN: No, I will stipulate that she had $8,850 in her possession and did not file the appropriate form.

THE COURT: And that she had, in fact, had it, on her person in a brassiere and that she reported that she did not have any money on her?

MR. SHERMAN: That is correct.

MR. WILSON: Not only did not report it, your Honor, and that is government's Exhibit No. 1 which is the initial declaration where the form is signed by the claimant, where she checked the box "No" in response to the inquiry about currency.

In addition, there was three opportunities given by the Customs inspector to indicate that she was carrying currency over $5,000 and, in each case, her response is negative.

Furthermore, I suppose this is more in the nature of offer of proof, if you will, the agent that performed the personal search at the time she counted the money, she errored in addition, and she said, "Oh, I see you have $9,950."

At that point the claimant said, "No, I know how [104] much I have. It is not that much."

MR. SHERMAN: I would stipulate that that would be testimony.

THE COURT: Very well.

MR. SHERMAN: I would also ask for the stipulation that Mrs. Vasquez would testify the same in the criminal case, that she did not have to report the money because it was money that she had taken out of the United States and brought back in.

MR. WILSON: No problem with that.

THE COURT: All right. It will be so stipulated.

MR. SHERMAN: The other argument I would make is that, of course, the delay period should be the entire period of time between the time that the money was seized and the petition was eventually denied, and in that regard, I have some other letters that I had written to Customs asking for some action in this case. And if I may just refer to that, that is on April 26, 1976; that would be defendant's next in order.

I wrote Mrs. Pompeo and asked for a decision one way or the other. In addition—

THE COURT: When was that?

MR. SHERMAN: April of 1976. Then, again, in December of 1976, I wrote a letter to Mrs. Pompeo in-

forming her of the acquittal on the misdemeanor forfeiture section [105] and asking her that the funds be returned, and if there was any further delay, to please notify me so I might take appropriate action.

THE COURT: What date was that?

MR. SHERMAN: December 28, 1976.

THE COURT: That was, I take it, about the time of the trial?

MR. SHERMAN: That is correct.

THE COURT: And the conviction?

MR. SHEMAN: That was right after the trial was completed.

THE CLERK: Are you offering that, Mr. Sherman?

MR. SHERMAN: Yes.

THE CLERK: That will be Defendant's F marked for identification.

(Defendant's Exhibit F was marked for identification.)

MR. SHERMAN: I believe there was one other letter. I would also like to put into evidence a letter from me to John E. Brady, District Director, dated March 28, 1977, in which he informed me that the petition was denied but failed to give any reason for the denial.

THE COURT: Very well. It may go in.

MR. WILSON: The government has no objection, by the way, to any of these documents.

[106] THE COURT: Very well. Admit them all.

THE CLERK: So marked, your Honor.

THE COURT: Both plaintiff's and defendant's.

(Defendant's Exhibits A, B, C, D, and F were received in evidence.)

MR. SHERMAN: And just two other letters. On January 16, 1976, I wrote a letter to Mr. Snyder, District Director in Customs. I don't believe he was the District Director, but in any event, I wrote him on January 16, asking him for an update on the matter as to

what was occurring and received a reply back from Mr. Brady, dated January 20, telling me that the case was still under investigation.

If I might have both of those letters. I will read the last paragraph of that letter. It says:

> "When the investigation is completed, you will be notified so that this matter can be discussed orally."

But that never occurred.

THE COURT: These exhibits may be marked and admitted.

THE CLERK: Exhibits H and I, your Honor.

THE COURT: They may be admitted.

(Defendant's Exhibit H and I were marked for identification and received in evidence.)

MR. SHERMAN: In addition, your Honor, I would [107] make the argument because the government asked that the funds be subject to forfeiture in the criminal prosecution, and that since they chose to proceed in that way—in other words, to suspend the civil proceedings until the criminal case was completed, and they asked for forfeiture in the criminal case, and chose that pattern which to proceed, and the jury ending up acquitting Mrs. Vasquez and not stating that the funds were subject to forfeiture, at that time the government, in fact, chose the manner in which to proceed.

THE COURT: Is it the choice of remedies?

MR. SHERMAN: Yes. And they candidly state that if they would have chosen that procedure, if the jury would have convicted Mrs. Vasquez and held that the funds were subject to forfeiture, that would have been collateral estoppel in this case; that in all fairness, it should be the reverse.

The petition for remission was filed. I consistently asked for action on the petition. They consistently said, "No." It has now come out that the reason that they said no was because of the pending criminal case that

they chose to do it in that way, and they should be bound by their choice.

THE COURT: I know you have already made that argument. I think it has been made on the record. I have ruled in view of the fact there are different standards of [108] proof in the two proceedings; that they are not exclusive. One remedy is not exclusive.

MR. SHERMAN: In this regard, I would like to lodge with the Court a part of this record, a copy of the deposition of Janet Pompeo, which was taken in my office on January 6, 1978. Apparently the original was sent to Mrs. Pompeo and has not been signed yet, and I would be willing that she have an opportunity to read the original and make any corrections. She was talking about some grammatical corrections, and have it filed with the Court.

I would like her deposition as part of this record because there are definite questions and answers in there as the reasons for putting off the remission proceedings until the criminal case was completed. And I think that should be part of the record.

MR. WILSON: No. I object to that, your Honor. There are more than merely grammatical errors in the deposition, at least in the copy that we have received.

Mrs. Pompeo indicated that she has not received the original from the court reporter, that counsel had full opportunity to cross-examine the witness as to anything he wanted to bring up at that point in time, and I see no reason to introduce it into evidence in this case. It is not part of the Court's ruling.

MR. SHERMAN: It is either that, or I will have [109] to recall her to make the record complete. It is only a 21-page deposition, and I am perfectly willing to have her take all the time she wants to make the proper corrections.

THE COURT: Is there anything in there that is not covered by her testimony?

MR. SHERMAN: Yes. Maybe we can stipulate to the two things that came out in the deposition, which

I want as part of this record, is her testimony that she was under some informal understanding that once a criminal case was filed no further action should be taken on the action for remission until the completion of the trial, at the trial level.

If they will stipulate that was the reason for the decision, so to speak, of the remission—

MR. WILSON: I will so stipulate that that was that witness' understanding, that that was the proper procedure to be followed. We will stipulate to that.

MR. SHERMAN: The second point being that the reason she was under the understanding that she was to suspend the remission statute was because nothing should be done with potential evidence, that is, the money until the criminal case had been completed.

MR. WILSON: Simply that that was that witness' testimony in that deposition.

THE COURT: Very well.

[110] MR. SHERMAN: Also, for the record, I would make the request that I be permitted to call as a witness Mr. Brady, who is the District Director, to inquire as to the reasons for the denial if, in fact, he had any reasons at all. I have already been prevented from calling him—

THE COURT: The Court will rule that you are not entitled to call him for that purpose. It would be irrelevant.

MR. SHERMAN: I would also request some written documentation, if any exists, from the government showing any reason given for the denial of the petition. I think the government has already stated, and this may be part of the stipulation, that there is nothing in writing that shows why the petition was denied.

MR. WILSON: The decision of the District Director on the petition of mitigation or remission has been offered as one of the defendant's exhibits, and it speaks for itself.

MR. SHERMAN: There is nothing else in writing which shows the reason for his decision.

MR. WILSON: I will so stipulate.

THE COURT: Very well. Are you satisfied with that, counsel?

MR. SHERMAN: I am satisfied with the record.

THE COURT: Very well. The judgment for foreclosure will be granted for forfeiture.

[111] MR. SHERMAN: Your Honor, it is, obviously, my intention to appeal this matter. I would ask that the funds be placed in an interest bearing account pending the appeal of this matter.

MR. WILSON: I think that is perfectly proper, your Honor. We would require an order from the Judge to the Marshal to have that done.

THE COURT: If you will prepare an order, I will sign it.

MR. SHERMAN: All right. Maybe I will prepare that as part of my notice of appeal.

THE COURT: Well, yes. Okay.

MR. SHERMAN: I think it would be part of the judgment that the government prepare that the money should be put in an interest bearing account.

THE COURT: You are the one who is appealing. The government does not, as far as the government is concerned, they are willing to have it put into a general treasury.

MR. SHERMAN: I will prepare it. It is just when I have done this in the past, with government attorneys, they always put that as part of their judgment.

If you want me to prepare a separate document, I will.

THE COURT: The judgment would declare an [112] immediate forfeiture. Now, they can prepare a separate order.

MR. WILSON: I believe what Mr. Sherman wants is an order from the Court staying execution of the judgment, and I believe he should prepare an appropriate document. We would be happy to stipulate that execution of the judgment may be suspended pending both the filing of the notice of appeal and disposition by the Ninth Circuit.

MR. SHERMAN: My last request, your Honor, is that Miss Vasquez—well, there has been a ruling by the Ninth Circuit that she is an indigent, and the criminal appeal is now an indigent appeal. I will have to verify this, but I would appreciate if the Court, if it is appropriate, would make a similar declaration here so that I may obtain the transcript as an indigent appeal.

THE COURT: I don't know. Is there any provision for a civil case of this kind?

MR. WILSON: If there is not, your Honor, I believe that relief would have to be granted by the Ninth Circuit.

MR. SHERMAN: There is a forma pauperis appeal in the civil case. I know the form dates it that way. I have never done it before.

THE COURT: There is considerable doubt as to where the money comes from, and whether the Court has the power to encumber any funds, and, if so, what funds to pay [113] those expenses. I will want some authority on that.

MR. SHERMAN: All right.

THE COURT: Furthermore, I think counsel may be right. I think an application can be made with the circuit.

MR. SHERMAN: In the first place, you have to do it with the district court.

THE COURT: And, also, I think it can be made here, and also in the circuit. Either way, but I think there is some question as to money and maybe if you make an application to the circuit, it will come out of their budget because they know whether they have got the money to pay for it or not. I do not.

Very well. Are you content now with the record as it presently stands?

We will stand adjourned.

(Proceedings were concluded.)

[114] UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JESSE W. CURTIS, SENIOR JUDGE PRESIDING

UNITED STATES OF AMERICA, PLAINTIFF

vs.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY ($8,850) IN UNITED STATES CURRENCY, DEFENDANT

CERTIFICATE

I, DELIA C. SAY, hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court, Central District of California.

I further certify that the foregoing 113 pages comprise a true and correct transcript of the proceedings had in the above-entitled cause on January 17, 18, and 19, 1978, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this ——— day of May, 1978.

Official Reporter

SUPREME COURT OF THE UNITED STATES

No. 81-1062

UNITED STATES, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY

ORDER ALLOWING CERTIORARI

Filed March 22, 1982

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

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Opposition

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MAR 2 1982
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CLERK

81-1062

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS
IN UNITED STATES CURRENCY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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81-1062

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS IN UNITED STATES CURRENCY

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. Whether this Court should, consistent with its resources and philosophy of judicial restraint, [1/] decide if governmental delay in filing a forfeiture action can be justified because the claimant has filed an administrative petition for remission or mitigation with the Treasury Department, where the issue is moot nationally because Customs now uses a time waiver form permitting both prompt judicial forfeiture proceedings and a reasonable time period for Customs to investigate and process the petition?

2. Whether this Court should review an appellate decision expressly limited to its facts and conforming to precedent, where the Government committed an unjustified 18-month delay in providing an indigent citizen her minimum due process right to a post-seizure judicial forfeiture hearing, after claimant denied

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1/ Valley Forge Christian College v. Americans United For Separation of Church and State, (80-327) (January 22, 1982).

the basis for the forfeiture, was acquitted of the companion criminal charge, did not contribute to the delay and repeatedly requested the Government to promptly decide her claim?

STATEMENT

1. 19 U.S.C.§§1602-1604 divide forfeiture proceedings brought under customs laws into three stages: "The report of the seizing officer to the 'appropriate customs officer' (§1602); the appropriate customs officer's report to the United States Attorney (§1603); and the institution of court proceedings by the United States Attorney (§1604). Sections 1602 and 1604 provide that action be taken 'immediately' and 'forthwith' . . . ." [2/] Former §1603 contained no such requirement. [3/]

Before the 1978 amendment to §1603, in cases involving seizures under Title 19, the Fourth, Ninth and Tenth Circuits read the promptitude requirement into the section. [4/] The Tenth Circuit observed that "expedited proceedings by the seizing agent and the United States Attorney can mean little if there is a delay of any consequence." [5/]

The Solicitor General's petition assumes, without citation of authority, the application of §§1602-1604 to forfeitures under 31 U.S.C.§1102 (GB 4-6). [6/] In the context of First Amendment law, this Court declined to apply these sections to cure the invalidity of another forfeiture statute noting that even if they were applicable, they would not provide adequate time limits to cure the

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2/ Ivers v. United States, 581 F.2d 1362, 1369 (9th Cir. 1978).

3/ Act of Oct. 3, 1978, Pub.L.No. 95-410, §110(b), 92 Stat. 897, 19 U.S.C.(Supp.III) 1603 amended this section to include the "promptitude" requirement. See also Government's Brief at p. 5.

4/ State Marine Lines, Inc. v. Shultz, 498 F.2d 1146 (4th Cir. 1974); United States v. One 1970 Ford Pickup, Ser.No. F10YRG53615 564 F.2d 864 (9th Cir. 1977); Sarkisian v. United States, 472 F.2d 468 (10th Cir. 1973), cert. denied, 414 U.S. 976 (1973).

5/ Sarkisian v. United States, supra, 472 F.2d at 471.

6/ GB refers to the Government's Brief (Petition for Writ of Certiorari).

constitutional invalidity. [7/] The Ninth Circuit has found it unnecessary to decide whether these sections apply to seizures under 31 U.S.C.§1102, [8/] holding that Customs' obligation to act expeditiously in referring the seizure to the United States Attorney for commencement of legal proceedings "flows independently from the Constitution." [9/] In the only other published decision to consider the application of these sections to forfeitures under Title 31, the Fifth Circuit followed the Ninth. [10/]

2. Six and a half years ago, Customs officers seized $8,850.00 in United States Currency from Mary Josephine Vasquez when she returned home to this country after a trip to Canada. Vasquez did not properly fill out an unfamiliar Customs form required by then recently enacted legislation. [11/] Nor did she "declare" the $8,850.00 she had carried with her since the commencement of her journey from the United States to Canada [12/] (R. 33; Tr. 27-28, 30-33, 40, 43, 103-104). Claimant was apparently not required to report the money when she left the United States. Not having acquired it in Canada, claimant assumed, according to the

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7/ United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 368 n.2 (1971). See also GB 14-15 n.15.

8/ Ivers v. United States, supra, 581 F.2d at p.1370.

9/ Ibid.; The Ivers Court also held that proceedings involving such seizures are governed by the Customs Service's general regulations on the subject, noting that the application of these regulations, construed in light of the constitutional requirements, avoided the question of the facial constitutionality of 31 U.S.C.§1102.

10/ United States v. Thirty-Six Thousand One Hundred & Twenty-Five Dollars ($36,125.00) In United States Currency, 510 F.Supp. 303, 306 (E.D.La. 1980), aff'd, 642 F.2d 1211 (5th Cir. 1981).

11/ 31 U.S.C.§1102 became operative in 1971. §401(a) and (b) Pub.L 91-605. For legislative history and purpose see 1970 U.S.Code Cong. & Adm. News p.4394.

12/ "Tr." refers to the transcript of the civil forfeiture trial held before the district court on January 17 and 18, 1978. "R." refers to the Clerk's Record on Appeal that was filed wich the court of appeals. Although the facts are accurately set out in the court of appeals' published opinion, and generally accurately supplemented in the Solicitor General's Petition for Writ of Certiorari, claimant provides her own statement in order to both correct and emphasize particular areas of the record.

normal practice of declaring goods purchased abroad, that she was not required to report it when she brought it back. (Tr. 40-43). [13] This heinous offense of failing to fill out a governmental form and declare the money subjected Vasquez to a host of draconian sanctions, [14] criminal and quasi-criminal, [15] including the permanent forfeiture [16] of the "defendant" $8,850.00 and additional civil penalties. [17]

13/ Testimony at the criminal and forfeiture trials indicated that claimant was never given the opportunity to file the required 1101 form (Tr. 19, 34-38).

14/ During her six and a half year ordeal, as of this writing, in which the Government has illegally retained her property, Vasquez has endured: an 18-month administrative delay in investigation of her Petition For Remission Or Mitigation Of Forfeiture; a personal criminal investigation by the United States Customs Service in California and Washington; alleged investigations by the Montebello Police Department, Los Angeles Police Department, Los Angeles County Sheriff's Office and the Royal Canadian Mounted Police; a criminal trial where she was acquitted of the criminal charge which provided the basis for the seizure and forfeiture of the money in the first instance; a criminal appeal where her conviction for making a false statement was reversed and the indictment was dismissed against her by the district court on motion of the Government; a forfeiture trial; a successful appeal of the judgment of forfeiture to the Ninth Circuit; six and a half months of additional governmental post-judgment procrastination and now further litigation before this Court.

15/ As long ago as 1886, this Court recognized that forfeiture statutes, although styled as proceedings in rem, are actually penal in nature. Boyd v. United States, 116 U.S. 616, 634-35; accord One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700-701 (1965).

16/ U.S.Const. Art.III §3 places a lifetime limitation on the forfeiture of one's goods for the serious felony of treason. In United States v. Distillery in West Front Street, 25 Fed.Cas. 866, 867 (D.Del. 1870), the court rejected the logical argument that the lesser is necessarily included in the greater (see generally United States v. Watson, 423 U.S.411, 430 [Powell, J., concurring] ["(L)ogic sometimes must defer to history and experience"]). The argument was made that since the felony of treason is a more serious criminal offense than a misdemeanor violation of the revenue law, it follows one's property cannot, consistent with the Constitution, be forfeited, if at all, for more than one's lifetime. The court, like so many others, before and since, including this Court, selectively applied the legal fiction that forfeitures have historically been characterized as proceedings in rem against the guilty item and not in personam against the owner, innocent or otherwise, and upheld the forfeiture. See Exodus 21:28 (the goring ox); Blackstone's Commentaries; Smith, "Modern Forfeiture Law and Policy: A Proposal for Reform," 19 Wm. & Mary L.Rev. 661 (1978); Finkelstein, "The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty," 46 Temp.L.Q. 169 (1973).

17/ 31 U.S.C.§§1056, 1103.

The day after the seizure, Vasquez' attorney notified the District Director of Customs of the seizure and commenced his steadfast attempt to force the Service into action and obtain the return of her money (R. 35, 56).

On September 18, 1975, Vasquez was officially if incorrectly notified of her right to file a petition for remission or mitigation of forfeiture under 19 U.S.C.§1618 (R. 57). [18/] She filed her petition one week later (R. 58). During the ensuing months and years, Vasquez repeatedly requested that her petition be acted on as soon as possible (R. 60, 62, 65, 66).

3. The Customs Service delayed assigning an agent even to investigate the petition for over a month after the currency was seized (Tr. 48). Once assigned, agent Pompeo interviewed the relevant customs witnesses and collected the information necessary to indict Vasquez within a few days (Tr. 93, 99). On November 13, 1975, Pompeo contacted claimant's attorney in order to arrange an interview with Vasquez. Counsel declined, quite correctly, to permit an interview with Vasquez out of his presence, and suggested that Pompeo come to Los Angeles for the interview (Tr. 88). Despite counsel's offer, he was not contacted by Pompeo again until March 2, 1976 (Tr. 88). On March 5, 1976, Pompeo, who unbeknownst to claimant and her attorney was also conducting a criminal investigation of Vasquez, interviewed her under the guise of conducting an administrative investigation of the petition (Tr. 63, 71-73). [19/]

18/ The currency was seized under 31 U.S.C.§§1101, 1102. 31 U.S.C. §1104 is the correct section for petitioning for remission or mitigation of forfeiture under Title 31.

19/ Contrary to the Government's statement (GB 9), that claimant's submission of the affidavit of John Walters (R. 62-64) . . . "was the first innocent explanation offered by claimant for her possession of $8,850.00 while entering the United States. . . . (footnote omitted)," since there is nothing per se illegal about transporting United States Currency in or out of the country, no "explanation" is necessary. 1970 U.S.Code Cong. & Adm. News, p. 4398. Moreover, claimant's Petition For Remission Or Mitigation Of Forfeiture also provided an "innocent" explanation for her failure to declare the money (R. 58-59).

Based on the isolated fact that Vasquez had been arrested for a narcotics violation four years earlier, Pompeo unnecessarily expanded her investigation allegedly to include several other law enforcement agencies (Tr. 52-54, 95-96). These agencies were unaware that the currency had even been seized from Vasquez (Tr. 89-90). No information connecting claimant with any "criminal enterprise" was ever provided to Pompeo as a result of the investigations allegedly conducted by these organizations (Tr. 60, 91). Indeed, Pompeo admitted that she had no idea whether any of these agencies even conducted an investigation of Vasquez during the first nine months she delayed taking any action on the petition (Tr. 91-92). Further, Pompeo acknowledged that her 9-month investigation produced no new facts or information that were not known to her at its inception (Tr. 86). This failure to uncover information implicating Vasquez in any criminal activity was conspicuously absent from the criminal case report submitted to the United States Attorney and Pompeo's report to the District Director of Customs regarding the administrative petition (Tr. 60). 20/

4. On June 15, 1976, claimant was indicted for violating 18 U.S.C.§1000 (felony) and 31 U.S.C.§§1058, 1101 (misdemeanor). 21/ The criminal trial began on December 14, 1976, and on December 24, 1976, the jury acquitted claimant of the misdemeanor charge of willfully failing to file the////////////////////////////////////

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20/ This omission is significant because Pompeo allegedly suspected Vasquez had violated 31 U.S.C.§1059, the felony provision of Title 31. That section requires, inter alia, proof that any violation of that chapter was committed in furtherance of the commission of any other violation of federal law. Thus, the United States Attorney, who was eventually to evaluate the case for criminal prosecution, would need to have known whether or not to seek felony or misdemeanor charges against Vasquez. Further, claimant's lack of criminal involvement would also have been relevant to the District Director's guidelines for evaluating her petition on the merits (Tr. 54). This analysis of course presumes that someone in the Customs Service did read and evaluate her petition (see Tr. 5, 14, 22-24, 110).

21/ After a well-reasoned and scholarly analysis of these statutes and their respective legislative histories, one district court has held that a violation of 31 U.S.C.§1058 does not, without more, automatically violate the general false statement statute (18 U.S.C.§1001). United States v. Anderez, 502 F.Supp. 67, 69-71 (S.D.Fla. 1980); contra United States v. Fitzgibbon, 576 F.2d 279, 283 (10th Cir. 1978).

currency report she was not given an opportunity to file, but convicted her of making a false statement (GB App. C, 18a).

Vasquez' criminal conviction was reversed. United States v. Vasquez, 597 F.2d 192 (9th Cir. 1979). Thereafter the district court dismissed the indictment against her on motion of the United States (App. A, infra at 1a). [22/]

Customs took no action on claimant's administrative petition from June 1976 through March 28, 1977, because agent Pompeo claimed to have an "informal understanding" that once a criminal case was filed, no further action should be taken on the petition until completion of the criminal trial (Tr. 109). [23/] The basis for this "understanding" was that nothing could be done with the currency pending the completion of criminal proceedings because it might be used as evidence (Tr. 109). [24/] Thus, both the currency and the administrative investigation were unnecessarily placed in "limbo" for an additional 9-month period.

5. Eighteen months after seizure, on March 22, 1977, the Government pressed yet another of its legally conferred advantages

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22/ Since her conviction was reversed because the court's file containing prejudicial information was left in the jury room, where it was circulated among and partially read by some of the jurors, the court of appeals did not reach the other numerous assignments of error raised by Vasquez in her criminal appeal. United States v. Vasquez, supra, 597 F.2d at 194.

23/ Such reasoning, even if based on a good faith belief, would not explain the additional 3-month delay between Vasquez' acquittal on the monetary reporting act charge (December 24, 1976) and the denial of her petition on March 28, 1977.

24/ At the forfeiture trial, and at oral argument before the Ninth Circuit Court of Appeals, the Government was unable to offer any legal basis for this misunderstanding. In fact, at the criminal trial, the money was never introduced as evidence for the obvious reasons of security and trial convenience. Instead, the parties stipulated that Vasquez possessed the $8,850.00 on September 10, 1975. United States v. Vasquez, (77-3607; Reporter's Transcript of the criminal trial p. 483).

against Vasquez and filed a complaint in rem for forfeiture of the money. [25/] Claimant filed her answer on April 27, 1977 (R. 4).

The Government's Brief may give the incorrect impression that Vasquez did not dispute the factual basis for forfeiting the money. While she admitted that she did not file a required report form that Customs did not give her an opportunity to fill out or file (R. 58-59; Tr. 27-28, 40-43), she denied "knowingly" failing to report the money. [26/]

Claimant's petition was denied on March 28, 1977, after the forfeiture complaint was filed (R. 68). No reason was ever given for the denial and the Government stipulated it did not even

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25/ As the Solicitor General points out in his brief (GB 12, n.13), under existing law the Government, under the anachronistic fiction of a proceeding in rem, is allowed to proceed against the "defendant" currency after losing the criminal trial between the same parties on a virtually identical issue. The burdens of proof in the criminal case, and the quasi-criminal forfeiture case are different and the forfeiture statute here, while including knowledge of the reporting requirement by the alleged violator, does not entail proof of the same element of "willfullness" required by the criminal statute in the same chapter. Compare Coffey v. United States, 116 U.S. 436 (1886) with Stone v. United States, 167 U.S. 178 (1897) and Helvering v. Mitchell, 303 U.S. 391 (1938).

26/ First in her Petition For Remission Or Mitigation Of Forfeiture, then at her criminal trial, next at her forfeiture trial, and on appeal in this case before the court of appeals, Vasquez has contended that she did not know she had to report the currency because she had not acquired it abroad (see e.g., R. 58-59; Tr. 38, 41, 43, 104). This confusion is understandable since most customs reporting requirements address customs laws which require the declaration of items acquired abroad. In contrast, Title 31 reporting requirements are provisions of federal law enforced by the Customs Service which require a report of monetary instruments valued at $5,000.00 or more regardless of their origin. Indeed, the broad language of Title 31 reporting requirements and the vague, ambiguous implementing customs forms, routinely "catch" mistaken but well-intentioned citizens who may be intoxicated, have reading or eye problems or other physical disabilities or who simply do not read the form passed out by the flight attendant before signing it. Many such "technical violations" are never prosecuted, presumably because to do so would be both unfair and inconsistent with the statutory history and purpose of these laws. "The principal purpose of Title II of the bill (Reports of Currency and Foreign Transactions) is to furnish American law enforcement authorities with tools necessary to cope with problems created by so-called secrecy jurisdictions." 1970 U.S.Code & Cong. Adm. News at p. 4404.

know who denied the petition or why (R. 37, 68; Tr. 5, 14, 22-24, 110). [27]

Contrary to the Government's statement (GB 12), at trial claimant also attempted to litigate the district court's jurisdiction to review the denial of her petition. The court ruled that the Secretary of the Treasury's decision (denying the petition) would be subject to review in some circumstances, but not in this case. (Tr. 17-18; GB App. C 19a).

6. On May 22, 1981, the Ninth Circuit reversed the district court. The majority ruled in accordance with the well-established law of the Ninth and other Circuits[28] that, "[u]nder the facts of this case the Government failed to institute forfeiture proceedings in a timely manner and [that] such failure was not justified." (GB App. A 4a.) (Emphasis added.)

The Government's Brief misconstrues the majority's ruling regarding a showing of economic prejudice. (GB 13; App. A, 6a). In discussing dicta on the issue of economic prejudice in Ivers where the claimant had both pled guilty to the criminal charge

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27/ This ignorance and confusion on the part of the Government is at least consistent since Pompeo failed to include the negative results of her alleged investigations in a report to the United States Attorney and the District Director of Customs. No notes or physical evidence of the investigation were produced at trial (Tr. 58-59, 62, 83-84). Thus, whoever denied the petition was unaware that there had been an investigation which cleared Vasquez of any criminal activity regarding the money's source. See United States v. One 1972 Chevrolet Blazer, Etc., 563 F.2d 1386 (9th Cir. 1977) (Remanded for a "fuller evidentiary hearing" including consideration of the adequacy of the remission proceedings under 19 U.S.C.§1619 and applicable regulations as well as the propriety of the forfeiture.)

28/ United States v. Thirty-Seven (37) Photographs, supra, 402 U.S. at 407 (In proceedings under 19 U.S.C.§1305(a) forfeiture proceedings must be commenced within fourteen days of seizure and completed within sixty days after their commencement); United States v. One 1970 Ford Pickup, supra, 564 F.2d at 866 (9th Cir. 1977) (Action under 19 U.S.C. §1618 - 11-month delay in bringing forfeiture proceedings violates due process); United States v. One Motor Yacht Named Mercury, 527 F.2d 1112, 1114 (1st Cir. 1975) (12½-month delay in commencing forfeiture proceedings held undue deprivation of property rights); State Marine Lines, Inc. v. Shultz, supra, 498 F.2d at 1154-55 (4th Cir. 1974) (16-month delay in commencing judicial proceedings violates claimant's due process rights); Sarkisian v. United States, supra, 472 F.2d at 471 (10th Cir. 1973) (9½-month delay in commencement of judicial proceedings held an impermissible taking under the Fifth Amendment); United States v. Eight (8) Rhodesian Stone Statues, 449 F.Supp. 193, 200-203 (C.D.Cal. 1978) (16-month delay between seizure and commencement of forfeiture action violates due process and bars

and initiated the very delay complained about on appeal, [29/] the majority wrote: "A careful analysis of the constitutional basis for the promptitude requirement, however, shows that the degree of prejudice arising from the nature of the asset is simply not relevant in determining whether due process rights attach." (GB App. A, 6a). [30/]

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forfeiture action); United States v. One (1) Douglas A-26 B Aircraft, 436 F.Supp. 1292, 1299 (S.D.Ga. 1977) (Less than 11-month unexcused governmental delay in instituting forfeiture proceedings violates due process); Boston v. Stephens, 395 F.Supp. 1000, 1003 (S.D.Ohio 1975) (Unjustified 6-month delay in institution of forfeiture proceedings where delay not caused by claimant violated due process; vehicles ordered returned to claimant); United States v. A Quantity of Gold Jewelry, 379 F.Supp. 283, 287 (C.D.Cal. 1974) (Unexcused 22-month delay in bringing forfeiture action under 19 U.S.C.§1610 violated claimant's right to due process); United States v. One 1971 Opel GT, 360 F.Supp. 683, 640-42 (C.D.Cal. 1973) (Unexcused 13½-month delay between seizure and institution of forfeiture proceedings was a denial of due process); accord Von Neumann v. United States, No. 79-3761 (9th Cir. Nov. 2, 1981) (Unexcused 1-month delay in acting on claimant's petition violates due process); Sequin v. Eide, 645 F. 2d 804, 808-09 (9th Cir. 1981) (In a Bivens suit for return of car, unexcused 4½-month delay between seizure and referral to United States Attorney violated due process); see also Stypmann v. City and County of San Francisco, 557 F.2d 1338, 1344 (9th Cir. 1977) ("Days, even hours, of unnecessary delay may impose onerous burdens upon a person deprived of his vehicle"); Lee v. Thornton, 538 F.2d 27, 33 (2nd Cir. 1976) (Where property seized for forfeiture, action on petition for remission or mitigation required within 24 hours).

29/ Ivers v. United States, supra, 581 F.2d at 1372.

30/ This distinction was apparently also overlooked by the learned dissenting judge, who, we respectfully submit, failed to consider that Ivers had pled guilty to the criminal violation and his attorney had requested and was granted an extension of time in which to file a petition, and specifically requested that no judicial proceedings be commenced during the period of that extension. Moreover, the Fifth Circuit has held that a voluntary guilty plea alone is sufficient to enter a judgment of forfeiture against the guilty claimant's property and bars a due process delay defense even where the claimant has not contributed to the delay. United States v. Thirty-Six Thousand One Hundred & Twenty-Five Dollars ($36,125.00) In United States Currency, 642 F.2d 1211 (5th Cir. 1981), aff'g 510 F.Supp. 303 (E.D.La. 1980).

7. As we previously pointed out to this Court, this case is at least two years older than it should be because of the United States. [31/]

The Government's Petition for Rehearing before the Ninth Circuit was due within 14 days following May 22, 1981. [32/] On June 2, 1981, the Government sought and obtained, over claimant's opposition, a stay of the mandate to July 6, 1981, in order to advise the Solicitor General and permit him time to make his decision to "seek rehearing and/or certiorari."

On August 21, 1981, the Government's petition for a rehearing was denied and the suggestion for rehearing en banc was unanimously rejected by the full court (GB App. B 13a). [33/]

Since last summer, the Government has sought and been granted three additional extensions of time in the court of appeals over claimant's opposition in order to make up its mind what to do in this case, and another (fourth) extension in this Court (GB 2).

On December 7, 1981, the Solicitor General filed his Petition for a Writ of Certiorari. On January 29, 1982, this Court requested claimant to file a response including 40 printed copies on or before March 1, 1982. Claimant has filed her motion to continue to proceed in this Court as she did in the court of appeals (in forma pauperis) concurrently with the filing of her Brief.

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31/ See our Opposition to Application for an Extension of Time Within Which to File a Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit received for filing in this Court on November 7, 1981.

32/ Rule 40, Federal Rules of Appellate Procedure.

33/ Not even the dissenting judge voted to grant the suggestion for rehearing en banc (GB App. B 13a).

ARGUMENT

1. Assuming the accuracy of the Government's cited statistics on the number of annual Customs' seizures, the delay issue has arisen infrequently and received substantially consistent treatment among the limited number of courts of appeals which have considered it (GB 20, n.22). The individual cases turn on their own facts. Any apparent variation among the circuit decisions on this issue is factual in nature and based on differences in result not principle. Compare United States v. 2,200 Paperback Books, 565 F. 2d 566, 573 (9th Cir. 1977) (no due process violation where Government acted diligently and where claimant's legal maneuvers produced the delay). This is not surprising because the constitutionally reasonable time limits for the Government to commence judicial forfeiture proceedings will vary with the peculiar facts of each case including the number of parties and the legal and factual issues presented.[34/] United States v. Thirty-Seven (37) Photographs, supra, 402 U.S. at 374. Indeed, due process is a flexible concept and calls for such procedural protections as the particular situation requires. Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

The Solicitor General contends, inter alia, that the administrative petition for remission or mitigation of forfeiture is the only viable means of obtaining the return of property seized for forfeiture.

34/ For example, in a simple case where one criminal defendant/party claimant voluntarily sells narcotics to a Government agent in a car to which he holds clear title, and then pleads guilty to the criminal offense in district court, it will not take the Government long to investigate the case and deny the administrative petition. Indeed, on these facts, the Fifth and Ninth Circuits have held that there is no defense to a judgment of forfeiture. See supra at n. 16. If the Government's case volume requires more time, it may easily obtain a time waiver. See discussion, infra, 15. If the claimant refuses to waive time, the 2-3 paragraph complaint for forfeiture can be quickly filed. The Government will likely be awarded a default judgment. If not, no trial time will be required because the Government will usually prevail on a brief form motion for summary judgment. Absent a jurisdictional defect, this hypothetical claimant, unlike Vasquez, has no factual or legal defense. Thus, most defenseless claimants will sign a time waiver and the Government can, consistent with the Due Process Clause, take as long as it wants to decide the petition within the time allowed by the statute of limitations.

(GB 19-25). Thus, the argument goes, it is unfair to penalize the Government because in this case it took an unjustifiably long period of time (18-months) to deny the administrative petition and begin a forfeiture action (GB 24-25). Vasquez disagrees with almost every conclusion reached by the Solicitor General except that the administrative petition is frequently the only means of obtaining relief. This conclusion is based on a fundamentally different view.

The forfeiture laws are unfairly skewed in favor of the Government at every stage of the administrative and judicial proceedings.[35/] Thus, as a practical matter, most citizens, like Vasquez,

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35/ First, the Government seizes the property without a warrant based on the opinion of a law enforcement officer, himself engaged in the competitive business of ferreting out crime. At the time of the seizure, all rights and legal title to the property pass to the Government. United States v. Stowell, 133 U.S. 1, 16-17 (1890). The warrant for arrest that is eventually issued frequently, as in this case, years after the seizure, is authorized by a clerk of the district court without approval by a neutral magistrate or hearing officer. Rule C, Supplemental Rules of Federal Civil Procedure. But Cf. Karl Senner, Inc. v. M/V Acadian Valor, 485 F.Supp. 287 (E.D. La. 1980).

Under the ancient fiction of a proceeding in rem, the Government is allowed to avoid both the Fifth Amendment's double jeopardy bar and the consequences of the doctrine of collateral estoppel and proceed against the "guilty" property item notwithstanding an acquittal on the previous criminal charge. One Lot of Emerald Cut Stones and One Diamond Ring v. United States, 409 U.S. 232 (1972). Even though the forfeiture statutes "are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise" (United States v. United States Coin and Currency, 401 U.S. 715, 721 (1971)), the entirely innocent third-party owner may still be deprived of his property unless he can prove not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could have been expected to prevent the proscribed use of his property. Calero-Toledo v. Pearson Yacht Leasing, 416 U.S. 688-690 (1974). At trial the burden of proof is on the "accused" owner or possessor (U.S. v. One 1975 Mercedes 280 S., 590 F.2d 196, 199 (6th Cir. 1975), and the Government can sustain its slight burden by the use of hearsay evidence.

Despite the law's penal purpose, Boyd v. United States, supra, this Court has rejected many of the procedural safeguards which would normally attach in a criminal case. In United States v. Zucker, 161 U.S. 475 (1896) this Court rejected the claimant's contention that he was denied his Sixth Amendment right to be confronted with the witnesses against him when a deposition taken in his absence was admitted into evidence. This Court relied on the fiction that personal rights do not attach in an in rem action. Compare Boyd v. United States, supra, (Fifth Amendment privilege applicable) and One 1958 Plymouth Sedan v. Pennsylvania, supra, (Fourth Amendment rights apply). The fictitious "civil" nature of the hybrid forfeiture proceeding denies the defendant/claimant the right to the reasonable doubt standard of proof. Bramble v.

who cannot afford the cost of fighting their Government in court for over half a decade, probably are forced by the harsh nature of these laws and economic necessity to depend upon the administrative process to obtain the return of their property. United States v. One 1971 Opel GT, supra. "Surely the Claimant is not to be disadvantaged or penalized for seeking the cheapest way to assert her rights without the need of a lawyer and for taking what the claimant apparently believes would be the quickest way to get her property back." Id. at 640-641.

However, even if administrative relief from the permanent forfeiture of otherwise non-contraband property [36/] for failing to fill

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Richardson, 498 F.2d 968 (10th Cir. 1974). Nor is a unanimous verdict probably required. Cf. Johnson v. Louisiana, 406 U.S. 356 (1972). Although one court has admitted that the Eighth Amendment may apply even though the forfeiture action is nominally in rem and civil in form, Toepleman v. United States, 263 F.2d 697 (4th Cir. 1959), this Court's decisions in Calero-Toledo v. Pearson Yacht Leasing, supra, permitting the forfeiture of a $20,000 yacht belonging to a leasing company because one marijuana cigarette was found on board, and more recently in Hutto v. Davis (81-23)(1-11-82) and Rummel v. Estelle, 445 U.S. 263 (1981) militate strongly against the recognition of the defendant/claimant's Eighth Amendment rights in this context. Similarly, the Sixth Amendment right to a speedy and public trial presumably does not apply. In Lee v. Thornton, 370 F. Supp. 312 (D.Vt. 1974), reversed on other grounds 420 U.S.139 (1978), the Sixth Amendment right to the effective assistance of counsel was also held not to apply.

Moreover, contrary to the Government's claims, the Customs Service routinely refuses to deposit any seized currency in an interest bearing account. Contrary to the learned Circuit Judge's dissenting opinion here, interest cannot be obtained in a suit against the United States except where it is provided for by statute. The statutory rates, which do not apply to these proceedings, do not begin to compensate a claimant for the loss of use and value of the currency due to the inflation rate. See McKay v. McInnes, 279 U.S. 820 (1928)(The right to use and derive a profit from property is property); See generally U.S. Department of Labor, Bureau of Labor Statistics, Office of Prices and Living Conditions Consumer Price Index (CPI).

36/ Money, like a car, is not "'intrinsically illegal in character,' but derives (its) 'contraband' status (if any) only from (its) association with criminal activity...". United States v. One 1972 Datsun, etc., 378 F.Supp. 1200 (D.N.H. 1974).

out an ambiguous bureaucratic form is the only practical remedy available to the citizen, intervention by this Court (already laboring under its busiest docket in history) is not required. see Brown Transport Corporation v. Atcom, Inc., 439 U.S. 1014 (1978) (White, J., and Blackmun, J., dissenting from denial of certiorari; statements by Burger, C.J., and Brennan, J.); see generally Comments by Chief Justice Warren E. Burger to the American Bar Association - Yearly Meeting in Chicago, Feb., 1982.

The Solicitor General's own client agency in this case made the issue moot approximately two years ago. [37/] At least in California, the Customs Service adopted the Ninth Circuit's suggestion in Ivers v. United States, supra, 581 F.2d at 1371-72, and prepared a time waiver form:

> "We hold, then that the mere filing of a petition for remission under 31 U.S.C.§1102 does hot excuse the Government from its obligation to commence prompt judicial proceedings until that petition is decided. This does not, of course, preclude the parties from agreeing that judicial action should be postponed pending the resolution of an administrative claim; it simply prevents the unilateral adoption of that course by the Government." Id. (Orginal emphasis.)

The form, when executed by the claimant or his representative, waives the claimant's right to a "prompt" referral of the matter to the United States Attorney for the institution of judicial forfeiture proceedings. See 19 U.S.C.§1603. (See App. B, infra 2a).

This simple form permits the party-claimant to revoke his waiver at any time and obtain prompt judicial review. It also allows

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37/ Counsel for claimant has contacted the Office of the District Director of the U.S. Customs Service in Los Angeles, California, and the Headquarters Office in Washington, D.C., in an effort to determine when the time waiver form was first created and implemented. Based on cases currently pending in the Central District of California, e.g., United States v. $29,000.00 in United States Currency, (CV 81 5764 R) the waiver form has apparently been in use in this district since at least June of 1980.

the Customs Service a constitutionally reasonable time period to process the petition administratively. This new flexible administrative procedure accomodates competing governmental and private interests and comports with the latitude required by due process. Matthews v. Eldridge, supra.

Thus, contrary to the Government's exaggerated and misinformed claim, the Ninth Circuit's decision here will not flood our already overburdened court system with thousands of additional cases (GB 20 n.22). Further, the Solicitor General's alarmist specter of national chaos in enforcing the forfeiture laws in general, as predicted in the closing pages of the Government's Peti n, is quickly dispelled as an unjustified and misleading attempt to obtain review of a nationally insignificant issue by this Court (GB 24-26). The time problem and procedural basis for the court of appeals' finding of unreasonable delay in this isolated case have been cured by the Customs Service's prospective use of the time waiver form. There is no apparent principled reason that the Solicitor General's other client agencies cannot also adopt a similar administrative mechanism.

The peculiar facts in this case arose before the creation and implementation of the time waiver form and in spite of claimant's persistent attempts to obtain a speedy administrative decision on the merits of her petition supported by reasons and made by an identifiable human being. (See supra, 8-9.)

The alleged conflict among the court of appeals' decisions on the non-issue of whether Customs may unilaterally decree that the filing of an administrative petition tolls the Government's time for filing a civil suit either does not exist or may be resolved based on the facts of the cases. The Solicitor General's reliance on dictum from a First Circuit ruling, which he concedes at another point in his petition was based on an ambiguous appellate record (GB 19 n.20) and on old or alternative decisions of the Tenth Circuit, is misplaced.

The very language from the Tenth Circuit's decision in White v. Acree, 594 F.2d 1385, 1390 (1979), cited and relied on by the Government as proof of a conflict in need of resolution by this Court, states that where parties file for administrative relief, without asking for commencement of court proceedings on the legal issues,

> " . . . they may not complain of abridgment of their rights to procedural due process during a reasonable period for investigation . . . . In other words, they may forego their right to a quick hearing, if such may reasonably be inferred from their actions. A mere request for administrative relief, however, does not bind the property owner to the Hobbesian choice of countenancing all the delays a vast federal bureaucracy can produce." Id. (Emphasis added.)

This language is legally congruent with Ivers and this case. There is no conflict. Here, the Government: did not even assign an agent to investigate claimant's petition for over a month; admits it did nothing for one 9-month period; saw nothing wrong with interviewing claimant for a criminal investigation without informing her attorney of the nature of the investigation; waited a total of 18 months despite repeated requests by claimant to decide her petition; and stipulated it didn't know who denied it or why. (Supra , 9.) Any variance in the Tenth Circuit's reasoning in White v. Acree, supra, which, as the Government concedes, reaffirms its original decision in Sarkisian (GB 18), does not conflict in substance with the majority decision here because the Government's delay was clearly unreasonable under any standard. Similarly, the First Circuit's dictum in United States v. One Motor Yacht Named Mercury, supra, avails the Government little. There too the court of appeals affirmed the district court's finding that the Government's conduct was unreasonable. Id. at 1114.

All of these cases were apparently argued and decided before the institution of the waiver procedure which effectively nullified the issue and the Government's petition. Thus, according to the Government's figures, since 90% of all forfeiture cases are resolved administratively (GB 20), and claimant estimates that the waiver form has been in use in at least some areas for approximately two years, this issue is also unlikely to recur. Cf. Roe v. Wade, 410 U.S. 113, 125 (1973).

Therefore, the Government's Petition for a Writ of Certiorari should be denied.

2. The Solicitor General argues that the panel's ruling here conflicts in principle with decision of this Court and other courts of appeals (GB 14-19). This conflict, he asserts, has somehow "compromised" the Government's use of the forfeiture statutes to enforce the criminal law (GB 14). This position is without legal merit. No cases by this Court involving forfeiture laws are cited in the Solicitor General's petition in support of this alleged conflict in principle. [38/] The petition is similarly devoid of any discussion of relevant Supreme Court decisions which have considered due process issues in the context of personal property rights. (E.g., Fuentes v. Shevin, 402 U.S. 67 [1972]; Lynch v. Household Finance Corp., 405 U.S. 538 [1972]; Sniadach v. Family Finance Corp., 395 U.S. 337 [1964]). [39/]

38/ United States v. Thirty-Seven (37) Photographs, supra, is quickly distinguished (GB 14-15 n.15).

39/ The oblique reference to Parratt v. Taylor, (No. 79-1734) (May 18, 1981) (GB 15), a case involving the negligent loss of a state prisoner's hobby materials, is of little help. There, the due process discussion focused on pre-deprivation v. post-deprivation hearings, an issue already resolved by this Court in the forfeiture context in Calero-Toledo v. Pearson Yacht Leasing, supra.

Carey v. Piphus, 435 U.S. 247 (1978) is also inapposite.

The Government's passing reference to a line of criminal cases confirms the illusory nature of the appellate conflict it perceives (GB 15). Even in the criminal law, with the accused constitutionally entitled to a speedy trial (one of many rights not conferred on forfeiture claimants) and the society's interest in the administration of criminal justice directly in issue, this Court has emphasized that the most important factor in a claimed due process violation is the accused's acquiescence in the delay. Barker v. Wingo, 407 U.S. 514, 534-36 (1972). "[T]he major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense." United States v. Marion, 404 U.S. 307, 320 (1971).

Here, the district court recognized the inevitable "personal prejudice" resulting from governmental delay and stated:

> "There is a considerable amount of money that belongs to a person who can be seriously jeopardized by being deprived of it for a period of nine months. And the fact that she does not know for that period of time is jeopardizing even though she may eventually lose it." (Tr. 18.)

The bulk of petitioner's argument for certiorari addresses perceived conflicts among the courts of appeals (GB 16-19). The Fifth and Eighth Circuit cases cited by the Government involve circumstances where the claimant either admitted the property was subject to forfeiture (United States v. Various Pieces of Semi-Conductor Manufacturing Equipment, 649 F.2d 606, 607 [5th Cir. 1981]), or the brief period of delay involved, having been found to be reasonable by the district court, was affirmed on appeal (United States v. One 1973 Buick Riveria Auto, 560 F.2d 897 [8th Cir. 1977] [Per Curiam] [5-month delay]). 40/

40/ United States v. One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443AY, 501 F.2d 1327 (5th Cir. 1974) must be limited to its highly unusual facts. There, also, in a per curiam opinion, the Fifth Circuit never mentioned the issue of prejudice and the claimant's petition

The Fifth Circuit opinion in United States v. Thirty-Six Thousand One Hundred & Twenty-Five Dollars ($36,125.00) In United States Currency, supra, adopted outright entire sections of the Ninth Circuit's opinion in Ivers, where the claimant also had pled guilty and contributed to the delay. 510 F.Supp. at p. 307. Thus there is no conflict among the Fifth, Eighth and Ninth Circuits.

Contrary to the Solicitor General's excessive claims, the prejudical delay issue has not been "well ventilated" nor is it "ripe" for consideration by this Court. If the Government must "guess" at the rule in other circuits, it is only because the Second, Third, Sixth, Seventh, District of Columbia and Eleventh Circuits have apparently not passed on the question. Thus, it may be "impossible" to know their positions. This, however, is always the case when a court has not decided a question, and is not a ground for granting certiorari to the Ninth Circuit.

The Government's plea that it is "impossible to reconcile the various decisions of the courts of appeals" should not obfuscate the substantially consistent holdings of the appellate and district courts which have reviewed the delay issue. (See discussion supra, at n. 28.)

3. In a parting shot the Solicitor General attacks the dismissal remedy in this forfeiture case, an issue not argued in the Ninth Circuit, concluding without citation of authority that "the harshness of the remedy" may explain why so few courts have used it (GB 22).

How petitioner, who enforces forfeiture statutes which are among the harshest laws in the land can, on this record, complain about the remedy is surprising. Absent a consensual judicial sale of the property (not applicable here) and division of the proceeds among multiple claimants or perhaps an administrative offer in compromise (see 19 U.S.C.§1617; 19 C.F.R.161.5), it is very difficult

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for remission or mitigation of forfeiture was granted. After negotiating with Customs regarding the storage charges for at least another month, the case was finally turned over to the United States Attorney. Under these circumstances, the court held that the actions of the U.S. Attorney were in compliance with 19 U.S.C.§1604.

to cut the baby in half.

Historically, forfeiture cases involve situations where either the "guilty" property is forfeited to the sovereign or returned to the claimant. Conceptually, there is no viable middle ground. Moreover, most claimants, unlike petitioner, do not have a permanent staff of paid Government lawyers at their disposal with which to litigate a claim for damages based on the Government's violation of the Constitution it is supposed to uphold and represent.

Petitioner's proposed remedy would result in a third trial or hearing, including perhaps discovery and other procedures, to decide the extent of damages necessary to compensate the claimant after she had lost the forfeiture action. Thus, while the Solicitor General's proposed alternative remedy might be good for lawyers it would only increase costs, expenses and litigation for society.

CONCLUSION

> ". . .[I]t is deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the People of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments." United States v. Chadwick, 433 U.S. 1, 16 (1977) (Brennan, J., concurring.)

The Petition For Writ of Certiorari should be denied.

Respectfully submitted,

VICTOR SHERMAN and PAUL L. GABBERT of

NASATIR, SHERMAN & HIRSCH
Attorneys for Claimant, Mary Josephine Vasquez

February, 1982.

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)		V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
5/18/79	9TH CIR CRT JUDGMNT	as to deft VASQUEZ, reversing and remanding judgmnt of CD/CA jpt				
6/26/79	NOT OF FLG & SPREAD OF JUDG OF CRT APPEALS	as to deft VASQUEZ, retnbl 7/2/79 2pm jpt				
6/28/79	NOT OF CONT	as to deft VASQUEZ, to 7/16/79 2pm for hear jpt				
7/16/79	HEAR FOR FLNG & SPREAD JUDGMNT USCA (AAH)	as to deft VASQUEZ, dft mvs to set cs for status hear instd of tr, govt t/make deter re fur tr. Crt finds status conf in bst inter of deft & publ & excludes ti purs 3161(8)(A). Ord set for status hear 8/6/79,10am. Fld & spread judgmnt USCA reversng & remand to USDC. ENT 7/23/79 jpt				
7/16/79	CR 37	as to deft VASQUEZ, exclud ti procedural delay jpt		7/16/79 8/6/79	G	22
8/6/79	STATUS CONF (AAH)	as to deft VASQUEZ, ord dismsd in int of just on mtn of govt. Ord deft prep & subm ord purs Rule 7 jpt				
8/13/79	LODGED ORD	for dismsl of indict jpt				
8/13/79	ORD (AAH)	for disms of indict & exon of bond on mtn of govt jpt				

I hereby attest and certify on 26 FEB 1982 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By _____ Deputy

SEAL OF THE U.S. DISTRICT COURT CENTRAL DIST. OF CALIFORNIA

APPENDIX A

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

WASHINGTON

NOTICE OF SEIZURE AND INFORMATION FOR CLAIMANTS
(Seized Articles Valued in Excess of $10,000)

PLEASE TAKE PARTICULAR NOTE OF INFORMATION FOLLOWING CHECKED BOXES

To the Party Named in the Attached Letter:

You are hereby notified that the merchandise, conveyances or other articles shown on the attached document(s) were seized for violations of the Customs laws or the other laws enforced or administered by the U.S. Customs Service indicated on the attachment.

The facts available to the U.S. Customs Service indicate that you have an interest in the seized property. The purpose of this letter is to advise you of the options available to you concerning this seizure.

1. You may choose to take no action. If you take no action, the matter will be referred to the appropriate United States attorney 60 days from the date of this notice for the institution of judicial forfeiture proceedings in accordance with section 603, Tariff Act of 1930, as amended (19 U.S.C. 1603) and section 162.32, Title 19, Code of Federal Regulations; or

2. You may notify the District (or Area) Director of Customs, that you do not intend to file a petition for relief, an offer in compromise, or post the value of the seized articles to obtain release of the goods (see below) with the Customs Service and request that the matter be referred to the appropriate United States attorney for the institution of judicial forfeiture proceedings. If this option is followed, the matter will be immediately referred to the United States attorney. You may then be able to file a petition for relief with the Department of Justice pursuant to Part 9, Title 28, Code of Federal Regulations; or

3. If you wish to seek administrative relief, you must, within 60 days from the date of the attached letter (unless some other period is stated in the letter), file a completed copy of the attached form waiving your right to prompt referral of the matter to the United States attorney for the institution of judicial forfeiture proceedings and requesting administrative action, and:

(a) File a petition for relief with the District (or Area) Director of Customs in accordance with section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618) and section 171.11, Title 19, Code of Federal Regulations; or

(b) Submit an offer in compromise to the District (or Area) Director of Customs in accordance with section 617, Tariff Act of 1930, as amended (19 U.S.C. 1617) and section 161.5, Title 19, Code of Federal Regulations; or

(c) Unless the seized articles are prohibited entry into the United States, submit an offer to pay the appraised domestic value of the seized articles accompanied by payment or an irrevocable letter of credit with the District (or Area) Director of Customs in accordance with section 614, Tariff Act of 1930, as amended (19 U.S.C. 1614) and section 162.44, Title 19, Code of Federal Regulations. If Customs accepts your offer, the property will be immediately released and the security will be substituted for the seized articles and you may still petition for relief (see 3(a) above) or submit an offer in compromise (see 3(b) above).

If you complete and submit the attached waiver requesting administrative processing, together with any of the options in (a), (b), or (c) above, you will be requesting the Customs Service not to refer the matter to the United States attorney for the institution of judicial forfeiture proceedings while your petition or offer is pending administratively.

If your petition or offer is not accompanied by the attached waiver, or you request immediate referral on that form, this matter will be referred to the United States attorney immediately.

If you decide to file a petition for relief, an offer in compromise, or an offer to pay the value to obtain release, with the Customs Service, you should submit it in triplicate (3 copies) to the District (or Area) Director of Customs at the address shown on the attached letter.

If you follow any of the options in #3 above and you do not believe that the Customs Service is acting expeditiously on your request, you may notify the District (or Area) Director IN WRITING that you are withdrawing your request for administrative relief and the matter will be referred to the United States attorney within 14 days from receipt of your notice.

[ ] SPECIAL NOTICE TO MULTIPLE CLAIMANTS AND HOLDERS OF LIENS OR SECURITY INTERESTS

The information available to Customs indicates that another party has an ownership interest in the seized property identified on the attachment. Although you may avail yourself of the options listed above, no relief

will be granted to you until after judicial forfeiture unless your petition, offer, or request is accompanied by an agreement to hold the United States, its officers and employees harmless, and a release from the registered owner, and/or the person from whom the item was seized (contact the District (or Area) Director of Customs for details). Unless you submit the hold harmless agreement and release(s), the matter will be referred to the United States attorney.

[ ] PENALTY INFORMATION

In addition to the seizure(s) and forfeiture liability, a civil penalty has been or will be assessed in this matter. Details on the civil penalty are:

[ ] in the attached letter; or

[ ] being prepared and will be mailed shortly.

DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE

WASHINGTON

(Return this form with your petition or offer. if this form is not returned, this matter will be immediately referred to the United States attorney for the institution of judicial forfeiture proceedings whether you file a petition or offer or not.)

TO: District Director of Customs

I understand that property in which I have an interest has been seized for violation of the Customs laws or other laws enforced or administered by the U.S. Customs Service, under Case No. 25-2729-005111/4V
(Case No. from attached letter)

[✓] I hereby waive my right to prompt referral of this matter to the United States attorney for institution of judicial forfeiture proceedings, and request that my petition or offer, attached, be considered administratively. I understand that I may request referral of this matter to the United States attorney at any time.

[ ] I DO NOT waive my right to prompt referral of this matter to the United States attorney for institution of judicial forfeiture proceedings. Please immediately refer this matter to the United State attorney together with my petition or offer, if any, attached.

Paul L. Jackson
(Signature)

6-2-80
(Date)

REPLY TO: COMMISSIONER OF CUSTOMS, WASHINGTON, D.C. 20229

Office - Supreme Court, U.S.
FILED
MAR 2 1982
ALEXANDER L. STEVAS,
CLERK

81-1062

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS IN UNITED STATES CURRENCY

MOTION TO PROCEED IN FORMA PAUPERIS

Claimant, Mary Josepine Vasquez, by and through her counsel, Victor Sherman, hereby moves for an Order to proceed in forma pauperis in her Brief in Opposition to the Petition for a Writ of Certiorari in the above-entitled action, and to so proceed without being required to pre-pay fees and costs, or to give security therefor.

The nature of the instant action is a petition by the United States of America for a Writ of Certiorari to review the judgment on appeal in favor of respondent, Eight Thousand Eight Hundred Fifty Dollars ($8,850.00), entered by the United States Court of Appeals for the Ninth Circuit on May 22, 1981. 1/

By order of the United States District Court for the Central District of California, on September 11, 1978 (nunc pro tunc as of April 6, 1978), claimant was granted leave to appeal in forma pauperis to the United States Court of Appeals for the Ninth Circuit from a judgment in favor of petitioner. A copy of the District

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1/ The opinion of the Court of Appeals is reported at 645 F.2d 836 (9th Cir. 1981). A Petition for Rehearing was denied on August 21, 1981.

Court Docket Sheet reflecting the order granting leave to appeal in forma pauperis, certified by the Clerk of the United States District Court, Central District of California, is attached hereto as Exhibit "A." (See Item No. 41 therein.)

Claimant believes she is entitled to redress before this Court, but is unable to pay for fees and costs, including printing costs for her brief, or to provide security therefor, in opposing the within Petition for a Writ of Certiorari.

Dated: February 26, 1982.

Respectfully submitted,

NASATIR, SHERMAN & HIRSCH

By: Victor Sherman
VICTOR SHERMAN
Attorneys for Claimant
Mary Josephine Vasquez

VIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	DOCKET NO. 77-1055 JWC
USA	$8,850.00 in US Currency	PAGE 3 OF ____ PAGES

DATE	NR.	PROCEEDINGS
9/1/77	tm	26. Fld pltf's notc of motn & motn for protective ord, retnble 9/19/77,10AM; memo of P/A in supp.
9/9/77	tm	27. Fld claimant's oppos to pltf's motn for protective Ord; memo of P/A in supp.
9/14/77	tm	28. Fld pltf's reply to claimant's oppos to motn for protective ord.
9-20-77	tm	29. Fld Claimant's Stip & ORD to cont PTC retble 11-7-77 10am.
9/23/77	ct	. LODGED Pltfs proposed ord to crt.
9/19/77	ct	30. MIN ORD: Pltfs' mtn for Protective ord. Mtn is GRNATED in aprt & DENIED in part. Cnsl for claimant may tk depos of Pompeo by notc of Brady.
9/27/77	ct	31. Fld Pltfs Amended 4th ntc of tkg depos of Claimant Mary Josephine Vasquez, 10/20/77,10am.
9/28/77	ct	32. Fld ORD that claimnts proposed depos of Dist Director J.E. Brady, U.S. Custo service, will not be allowed, while the claimant's proposed depos of Spec Agent Janet Pompeo, U.S. Customes service, may proceed.
10/28/77	ct	.. LODGED Pltfs Proposed PTC ord.
11/7/77	ct	33. MIN ORD: PTC. cnsl are pres & PTC held. Deft to file memo of Cont/Fact & Law w/in 10 dys. A 2 dy C/T set for 1/17/78,9:30am. 34. Fld Pltfs PTC ORD.
11/8/77	ct	35. Fld ORD re Trail prep for C/T, nlt 1/6/78.
11/15/77	ct	36. Fld claimant's amended 2nd ntc of tkg depof of Janet Pompeo, 12/16/77.
11/18/77	ct	37. Fld Claimant's memo of Cont/Fact law.
1/6/78	cw	LODGED PROPOSED FIND/Fact & conclu of law.
1/16/78	nm	38. Fld ORD(JWC)(MML), dtd 1/13/78, transfg the action to the cal of Judge Curtis for all fur procdgs. Attys notified. Local rule 2.
1/17/78	cw	39. MIN ORD: C/T 1st day: cont to 1/18/78 9:30am.
1/18/78	cw	40. MIN ORD: C/T 2nd day; judgmnt by crt for pltf; find/fact & conclu of law to be parpared by pltf.
1/23/78	cw	LODGED pltf's proposed find/fact & conclu of law.
9-11-78	rc	41. Fld ORD (Nunc Pro Tunc as of 4-6-78) granting appeal in forma pauperis.

EXHIBIT "A"

DC-111A (Rev. 1/75)

81- 1062

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED FIFTY DOLLARS
IN UNITED STATES CURRENCY

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
IN FORMA PAUPERIS

I, Mary Josephine Vasquez, being first duly sworn, depose and say that I am the claimant in the above-entitled case; that in support of my motion to proceed without being required to pre-pay fees, costs, or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to relief.

I further swear that the allegations which I have made below are true:

1. I am not currently employed and am not currently earning any salary or wages.

2. The last date of my employment was on or about 1961, when I was employed by Zenith Meat Packing, Vernon, California, and my wages at that time were Four Hundred Dollars ($400.00) per month.

3. Since on or about September 10, 1975, I have not received any money from a business, profession or other form of

self-employment; rent payments, interest or dividends; pensions, annuities or life insurance payments; or, gifts or inheritances.

4. I do not own any cash, nor do I have any money deposited in a checking or savings account.

5. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property, excluding ordinary household furnishings and clothing.

6. Since on or about September 10, 1975, I have been dependent upon allowances from my mother for my own maintenance and support.

7. I do not have the means to pay for the cost of printing my Brief in Opposition to the Government's Petition for a Writ of Certiorari as requested by this Court, and respectfully move that my type-written brief be filed instead.

State of California)
) ss
County of Los Angeles)

I, MARY JOSEPHINE VASQUEZ, being first duly sworn under oath, represent that I have read and subscribed to the above and state that the information therein is true and correct.

Mary Josephine Vasquez
MARY JOSEPHINE VASQUEZ, Claimant

Subscribed and sworn to before me this
26th day of February, 1982.

Lucia T. Smith
Notary Public in and for said
County and State

OFFICIAL SEAL
LUCIA T. SMITH
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
MY COMMISSION EXPIRES JULY 30, 1984

Reply Brief

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No. 81-1062

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) in UNITED STATES CURRENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our petition we presented three issues for review, *viz.*, whether delay in filing a civil forfeiture action is alone sufficient to violate due process, whether the claimant's filing of an administrative petition for remission or mitigation tolls the time within which the government must file a judicial forfeiture action, and whether dismissal of the government's forfeiture action is the proper remedy whenever impermissible delay is found. In opposing our petition, respondent has made a few assertions that warrant a brief reply.

1. With regard to the first issue, respondent simply asserts, without supporting analysis, that the cases of this Court and other courts of appeals cited in our petition that have held that prejudice is a required element for a due process violation based on delay are factually distinguishable (Br. in Opp. 12). While this Court has never dealt with

the specific issue presented by the instant case, its prior decisions nonetheless suggest generally that delay alone is not sufficient to violate due process. See *United States* v. *Lovasco*, 431 U.S. 783 (1977); *United States* v. *Marion*, 404 U.S. 307 (1971).[1] Due process requires no more than an adequate opportunity to be heard at a meaningful time. *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981). Although respondent complains bitterly about the delay in this case, she fails to explain (1) what possible injury to her case was caused by this delay and (2) why, if she was actually aggrieved by the delay, she did not terminate that delay either by withdrawing her petition for remission or mitigation or by filing an action in federal court to secure a prompt adjudication of the government's right to detain or forfeit the property. Respondent had a full and fair opportunity to reacquire the seized currency, assuming she was entitled to it, both through the discretionary administrative process and the judicial civil forfeiture process. Since the delay did not impair respondent's ability to assert any claim she might have had to defeat the forfeiture, and since the stipulated facts demonstrate that the court had no choice but to hold the property forfeited, the delay before the forfeiture was finally declared by the court in no way denied respondent due process.

Respondent asserts (Br. in Opp. 8) that her knowledge of the reporting requirement was a serious factual issue in this case that required a prompt hearing.[2] Whatever factual

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[1]Respondent dismisses these cases as "criminal" but makes no attempt to explain why the principle derived from them should not apply to any due process claim. Certainly, Judge Alarcon in his dissenting opinion recognized that these cases were instructive (Pet. App. 11a). Indeed, if anything, one would expect delays in criminal cases to be viewed as more serious than in civil cases.

[2]Respondent also states (Br. in Opp. 8) that she was never given an opportunity to file the currency report form (Form 4790) required by 31

uncertainty may exist regarding respondent's claimed lack of knowledge of her reporting obligation, however, is wholly irrelevant to any legal issue in the forfeiture proceeding. The forfeiture statute does not require as a precondition to forfeiture that the individual know that the currency must be reported. Cf. *One Lot Emerald Cut Stones and One Ring* v. *United States*, 409 U.S. 232, 234 (1972). Instead, it requires only knowledge that the currency is being transported. Respondent cites no authority that construes the plain language of the statute to import a knowledge requirement. In fact, there is no disagreement with regard to the relevant events surrounding the seizure; respondent stipulated to these facts before the district court. In light of respondent's use of an undergarment for transporting the $8,850, no one can seriously doubt she was aware that she was carrying this money. Moreover, respondent has never denied that she knew she was carrying it.[3] Thus, the forfeiture in this case in no way depended on the resolution of any factual disputes.

Without any issues of fact to be resolved, the effect of delay in this case is no more prejudicial than in those cases we relied upon in our petition (Pet. 16-17) where the claimant had pled guilty in a criminal prosecution. See *United*

U.S.C. 1101. The statute does not, however, require the form to be distributed to all travelers. This form is made available only to those who state that they do have more than $5,000 in their possession. When a traveler falsely states, as respondent did three times, that he is not carrying more than $5,000, he violates Section 1101, which subjects the currency to forfeiture under Section 1102. Thus, this claim raises no issue that would have warranted a hearing.

[3]As we recounted in our petition (at 6 n.5) there were posters all over the Customs area informing respondent of her duty to report this currency. We also note that respondent's assertion that her mistake was understandable since she "was apparently not required to report the money when she left the United States" (Br. in Opp. 3) is clearly wrong. She was required to report the money when she left. 31 U.S.C. 1101.

States v. *Various Pieces of Semiconductor Manufacturing Equipment*, 649 F. 2d 606 (8th Cir. 1981); *Ivers* v. *United States*, 581 F. 2d 1362 (9th Cir. 1978). The courts in those and other cases we cited expressly required proof of prejudice prior to finding a constitutional violation, while the court of appeals in this case clearly did not. Indeed, subsequent to the filing of our petition, the Eleventh Circuit rejected a claim that a 10½-month delay after seizure violated due process. According to the court, "due process required that the government proceed seasonably, so that Harold's right to contest the seizure of his automobile would not be *unduly prejudiced*." *United States* v. *One 1976 Mercedes 450 SLC*, No. 80-5158 (Feb. 16, 1982), slip op. 14555, 14559 (emphasis supplied).[4] A conflict among the circuits on this issue exists and warrants review by this Court.

2. Respondent devotes the bulk of her opposition to the argument that a waiver form adopted by the Customs Service in 1979 reduces the practical importance of the issue presented by our petition. Initially, we note that the waiver form is irrelevant to the issues of whether prejudice is a required element of a due process violation based on delay and whether the proper remedy for such a violation is dismissal of the civil forfeiture action.

More importantly, it is far from clear that execution of the "waiver" form would be held to bar a claim of "unreasonable delay" in processing the petition for remission or mitigation. The waiver would presumably eliminate the extreme and wasteful requirement in *Ivers* v. *United States*, *supra*, that the government file a forfeiture action immediately after the seizure even if an administrative petition has been

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[4]The court in *One 1976 Mercedes 450 SLC* also found that delay pending a criminal prosecution, as was involved in this case, was justifiable. Slip op. 14559-14560.

filed that could render a judicial forfeiture action unnecessary.[5] But the waiver form does not specify how much time the agency is allowed before the government loses its right to forfeit the property. Respondent relies (Br. in Opp. 15-16) on the part of the waiver form notifying the claimant of the right to withdraw the petition and obtain a prompt judicial determination, but the form affords no protection different from what was available to respondent in this case. If she had withdrawn her petition, the matter would have been transferred immediately to the United States Attorney. 19 C.F.R. 162.32 (1975).[6] Thus, even with the waiver form, the question remains whether the agency must act within some unspecified period or lose its right to forfeiture of the property.[7]

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[5]In our petition, we described (Pet. 4-6) the statutory procedures of 19 U.S.C. 1602-1604, which generally are followed by Customs in forfeitures under 31 U.S.C. 1102(a). However, the Customs Service's position is that the Title 19 requirements with regard to the timing of the various stages of the forfeiture process do not govern forfeitures under Title 31. This interpretation is based on the language of 19 U.S.C. 1602 and 1603, which is limited to "seizures of merchandise for violation of the customs laws;" the currency reporting requirements are not part of the customs laws but rather were enacted as Title II of the Bank Secrecy Act of 1970. Furthermore, Title 31 has its own provision, 31 U.S.C. 1104, authorizing remission or mitigation of a currency forfeiture, but has no provisions similar to 19 U.S.C. 1602-1604. By describing the administrative process derived from Title 19 that is followed generally in currency forfeiture cases by the Customs Service, we did not mean to suggest that Customs was statutorily required to follow these procedures. In any event, respondent does not rely upon the statutory provision as expanding her rights beyond what the Due Process Clause requires. Thus, the only issues presented in this case are constitutional ones.

[6]During the remission and mitigation process, respondent was represented by counsel, who must be presumed to have been aware of the applicable regulations. Had she desired prompt institution of judicial proceedings—as she almost certainly did not—she could readily have achieved that objective under the regulations existing at the time.

[7]Indeed, complying with the requirements of due process is becoming virtually impossible in the Ninth Circuit because of the agency's budget restrictions and the onerous procedural requirements being imposed by

In addition, the Ninth Circuit's ruling that due process requires the filing of a civil forfeiture action even though a petition for remission or mitigation is pending applies to agencies other than Customs, and some of those agencies do not employ a similar waiver provision. In fact, the Internal Revenue Service and the Drug Enforcement Administration inform us that they have adopted the practice of filing a judicial forfeiture action even though an administrative petition is pending. Although this action presumably protects the government's right to forfeiture, it does little to ease the burden on the courts or to provide any real protection to the claimant. In practice, moreover, the formality of filing the judicial action is likely to be followed by a stay of proceedings pending disposition of the administrative petition. It is hard to understand why the failure to do something that gains claimants so little in protecting their interest in the seized property should violate the Constitution.

In addition to the effect of the instant decision on other agencies and the questionable efficacy of the waiver form in eliminating the forfeiture delay issue, Customs estimates that there are over two dozen pre-1979 forfeiture cases still pending, involving in excess of a million dollars in property, that will potentially be lost to the government if the decision of the Ninth Circuit is allowed to stand. Thus, Customs itself has a substantial continuing monetary interest in pre-waiver cases.

3. Respondent attempts (Br. in Opp. 20) to dismiss our third issue, which involves the proper remedy for the assumed due process violation caused by delay, as not

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that court in this and other cases, *e.g.*, *Von Neumann* v. *United States*, 660 F. 2d 1319 (1981) (one-month administrative delay invalid; 24 hours to decide petition required prospectively).

properly preserved for this Court's review. We did not raise the remedy issue in our initial brief in the Ninth Circuit because we relied upon *Ivers* as requiring respondent to show prejudice, which respondent could not demonstrate in this case. After the court of appeals rejected sub silentio its prior ruling in *Ivers*, we petitioned for rehearing and clearly raised the remedy issue. As we argued in that petition, "The result reached in this appeal is inconsistent with *United States* v. *Morrison* [449 U.S. 361 (1981)], in that, even assuming the existence of a Due Process Clause violation in this case, reversing the judgment of forfeiture was not a proper remedy" (Pet. for Rehearing at 7). Indeed, our discussion of this very issue consumed well over half of our entire argument (*id.* at 5-11). Thus, the issue was pressed below and is properly before the Court.

On the merits of this issue, respondent suggests (Br. in Opp. 20-21) only that the alternative remedies we proposed in our petition (Pet. 22-24)[8] are unreasonable in light of the lengthy procedures that she already has followed in seeking to avoid this forfeiture. Of course, the only reason the procedures have been lengthy is because respondent, after clearly violating the law, has invoked all available methods to avoid a forfeiture that was perfectly valid at the time of the seizure in 1975. The government was not responsible for her decision not to declare the currency or her decision to seek administrative relief.

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[8]We particularly note that a person claiming that his property has been unlawfully seized may seek its return by motion pursuant to Fed. R. Crim. P. 41(e). Where the property has been lawfully seized, of course, there is little reason to conclude that a prompt, post-seizure hearing is constitutionally required.

Moreover, the only reason a damage action seems unjustified to respondent is that she has no realistic possibility of obtaining anything more than nominal damages, because the delay has caused her no real injury to any substantial rights. See *Carey* v. *Piphus*, 435 U.S. 247 (1978). On the other hand, if the decision of the court of appeals is allowed to stand, respondent will reacquire, through a judicial windfall, property that Congress has declared should be forfeited to the United States.

For these reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
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Brief for the United States

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QUESTIONS PRESENTED

1. Whether due process requires the filing of a prompt judicial forfeiture action following the seizure of property believed to be forfeitable.

2. Whether the passage of 18 months in this case between the seizure of unreported currency by the Customs Service and the institution of judicial forfeiture proceedings constituted unreasonable delay, in light of the pendency of a petition for administrative remission or mitigation and of a criminal investigation and prosecution growing out of the seizure.

3. Whether, assuming the delay in this case violated claimant's right to due process, dismissal of the civil forfeiture action was an appropriate remedy.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 645 F.2d 836. The district court's findings of fact and conclusions of law (Pet. App. 14a-20a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1981, and a petition for rehearing was denied on August 21, 1981 (Pet. App. 13a). On November 12, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 11, 1981. The petition was filed on that date and granted on March 22, 1982 (J.A. 89).

CONSTITUTIONAL PROVISION, STATUTES, AND RULE INVOLVED

The Fifth Amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *."

19 U.S.C. (Supp. IV) 1603 provides:

> Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs law is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report promptly such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. 1618 provides in pertinent part:

> Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury under the customs laws * * * a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto.

19 U.S.C. 1621 provides in pertinent part:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws

shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered * * *.

31 U.S.C. 1101 provides in pertinent part:

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly—

(1) transports or causes to be transported monetary instruments—

* * * * *

(B) to any place within the United States from or through any place outside the United States, or

* * * * *

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

31 U.S.C. 1102 provides in pertinent part:

(a) Any monetary instruments which are in the process of any transportation with respect to which any report required to be filed under section 1101(a) of this title either has not been filed or contains material omissions or misstatements are subject to seizure and forfeiture to the United States.

Fed. R. Crim. P. 41(e) provides in pertinent part:

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored and it shall not be admissible in evidence at any hearing or trial.

STATEMENT

A. The Statutory and Administrative Context

1. Section 231 of the Bank Secrecy Act of 1970 (31 U.S.C. 1101) provides that anyone who "knowingly transports * * * monetary instruments * * * to any place within the United States from or through any place outside the United States * * * in an amount exceeding $5,000 on any one occasion shall file a report" with the Customs Service declaring, *inter alia*, the amount being transported. The United States is empowered to seize and forfeit "[a]ny monetary instruments * * * with respect to which any report required to be filed * * * has not been filed * * *" (31 U.S.C. 1102(a)).

The purpose of the forfeiture provision, as explained by the sponsor of the legislation, is to serve as a "powerful deterrent" to international currency shipments by criminals who frequently employ couriers to transfer their ill-gotten gains to foreign bank accounts. See 116 Cong. Rec. 10402 (1970) (remarks of Senator Proxmire). Thus, in keeping with general concepts governing forfeiture statutes, forfeiture of the unreported currency is authorized without any showing of unlawful purpose or intent to violate the reporting requirements of Section 1101. All that need be established is that the traveler knowingly transported currency in excess of $5,000 and failed to make the necessary report. See *United States* v. *Four Million Two Hundred Fifty Five Thousand Six Hundred and Twenty Five Dollars and Thirty Nine Cents ($4,255,625.39)*, 528 F. Supp. 969, 971-972 (S.D. Fla. 1981); *Ivers* v. *United States*, 413 F.Supp. 394, 401 n.9 (N.D. Cal. 1975), rev'd in part on other grounds, 581 F.2d 1362 (9th Cir. 1978). Cf. *One Lot of Emerald Cut Stones* v. *United States*, 409 U.S. 232, 234 (1972).[1]

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[1] By contrast to the forfeiture provisions, Sections 1056 and 1058 of Title 31 authorize imposition of certain civil and criminal penalties only for "willful" violations of the reporting requirements. The courts have accordingly construed Section 1058 to require the government to prove "the defendant's 'knowledge of the reporting requirement

2. Section 1102 contains no provision specifying the procedures to be followed with respect to the forfeiture of seized monetary instruments. The Customs Service generally follows the procedures set forth in Title IV of the Tariff Act of 1930, 19 U.S.C. 1602-1604, which govern forfeitures for violations of the customs laws, and the regulations that implement those sections. Under these procedures, once the property is seized, the responsible Customs agent is obligated to report the seizure "immediately" to "the appropriate customs officer for the district in which such violation occurred" (19 U.S.C. 1602). Any person who appears to have an interest in the seized property is given written notice by the officer of the property's liability to forfeiture and informed of the right to petition the Secretary of the Treasury for remission or mitigation of the forfeiture. See 19 C.F.R. 162.31(a). A petition must be filed within 60 days from the date the notice of forfeiture is mailed (19 C.F.R. 171.12(b)). If the petitioner is not satisfied with the decision of the Secretary, he may file a supplemental petition within 60 days of the decision (19 C.F.R. 171.33(a)(1)).[2]

If no petition is filed, or if, after consideration and decision on a petition, it appears that legal proceedings in connection with the seizure are necessary, the appropriate customs officer, after appraising the merchandise (19 U.S.C. 1606; 19 C.F.R. 162.43), must prepare a full report of the seizure for the United States Attorney, giving all the relevant facts and circumstances (19 U.S.C. 1603; 19 C.F.R. 162.43).[3] At the time of the seizure in this case, Section 1603 contained no requirement as

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and his specific intent to commit the crime.' " *United States* v. *Dichne*, 612 F.2d 632, 636 (2d Cir. 1979), cert. denied, 445 U.S. 928 (1980), quoting *United States* v. *Granda*, 565 F.2d 922, 926 (5th Cir. 1978).

[2] Title II of the Bank Secrecy Act of 1970 contains its own remission provision, 31 U.S.C. 1104:

> The Secretary may in his discretion remit any forfeiture or penalty under this subchapter in whole or in part upon such terms and conditions as he deems reasonable and just.

[3] At the time of the seizure in this case, the statute provided that if the value of the seized merchandise was not more than $2,500, the customs officer could institute non-judicial, summary forfeiture pro-

tc how quickly the customs officer should prepare his report to the United States Attorney. Congress subsequently amended the statute to require the customs officer to act "promptly" when legal proceedings are required. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, Section 110(b), 92 Stat. 896, 19 U.S.C. (Supp. IV) 1603.

Upon receipt of a report, the United States Attorney is required "immediately to inquire into the facts" and, if it appears probable that a forfeiture has been incurred, "forthwith to cause the proper proceedings to be commenced and prosecuted, without delay" (19 U.S.C. 1604). After a case is reported to the United States Attorney for institution of legal proceedings, no administrative action may be taken on any petition for remission or mitigation. 19 C.F.R. 171.2(a).[4]

3. The Customs Service in the Department of the Treasury processes approximately 50,000 non-contraband forfeitures per year (see U.S. Customs Service, *Customs U.S.A.* 32 (1980)). Of those, the Service estimates that approximately one-half involve property with a value in excess of $10,000, for which a judicial forfeiture proceeding is statutorily required.[5]

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ceedings. See 19 U.S.C. 1607-1609. The limit has now been raised to $10,000. Act of Oct. 3, 1978, Pub. L. No. 95-410, Section 111(a), 92 Stat. 897, 19 U.S.C. (Supp. IV) 1607.

[4] If the property is declared forfeited by the court, the claimant does have the option of filing a petition for remission or mitigation with the Attorney General (see 28 C.F.R. 9.1 *et seq.*), although petitions will not be entertained in cases where Customs has denied administrative relief. Section 9.3(g). Remission is not granted by the Attorney General unless the claimant can show an absolute lack of "knowledge or reason to believe that the property * * * was being or would be used in violation of the law." Section 9.5(c)(2). Mitigation is proper only "to avoid extreme hardship." Section 9.6(a). Thus, in contrast to petitions addressed to the Secretary of the Treasury, relief from the Attorney General is reserved for extraordinary circumstances.

[5] Even for the seizures of property appraised at less than $10,000, the claimant has a right to a judicial determination upon posting a $250 bond to cover the costs. 19 U.S.C. 1608. Customs has indicated

In 90% of all seizures, the claimant files an administrative petition for remission or mitigation. The Secretary of the Treasury in turn grants at least partial relief for an estimated 75% of the petitions. Typically, this relief terminates the dispute without the filing of a forfeiture action in district court and thus provides an equitable and inexpensive method for resolving a substantial majority of forfeiture cases.

Although Customs does not maintain precise statistics reflecting the outcome of cases that go to court, it estimates that well over half of them are decided by a default judgment—presumably because there is no real factual dispute regarding the government's right to forfeit the property. As for those that are disposed of by summary judgment or trial, Customs estimates that it prevails in at least 80% of the cases, excluding decisions like the instant case in which the forfeiture has been disallowed because of delay.

B. Facts of this Case

1. On September 10, 1975, claimant Mary Josephine Vasquez flew from Canada to Los Angeles (Pet. App. 15a). After landing, she presented her Customs Baggage Declaration to a Customs inspector. On that form is the question: "Are you or anyone in your party carrying over $5,000 in coin, currency, or monetary instruments?" which she answered by checking the "No" box. The inspector asked Vasquez three times whether she or anyone in her party was carrying more than $5,000 in United States currency, and she answered in the negative on each occasion (*id.* at 15a-16a).[6]

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to us that this right is invoked rather infrequently and that judicial review of these forfeitures is probably requested in no more than ten percent of the cases.

[6] The Customs area in which Vasquez was inspected contains large color posters that state (Pet. App. 16a-17a):

> If you transport, mail, ship, or receive more than $5,000 in currency of the United States or any other country, or monetary instruments (such as traveler's checks, negotiable instruments in bearer form, or money orders) into or out of the United States, you must file a report with U.S. Customs. Ask a Customs officer

A second Customs inspector observed that Vasquez had an unusual bulge on the right side of her upper torso (J.A. 30). In addition, he recognized her name from a computer list of persons suspected of involvement in narcotics trafficking (J.A. 30-31). He therefore arranged for a female inspector to continue the examination by a pat-down of Vasquez in a private room (Pet. App. 16a). As a result of this search, an envelope containing currency was discovered in Vasquez's longline bra. The female inspector counted the money in Vasquez's presence and told her that she counted $9,950. Vasquez answered that it was "not that much" (J.A. 81), and, in fact, the envelope contained only $8,850, in 74 $100 and 29 $50 bills (Pet. App. 16a).

Eight days later, on September 18, 1975, Customs sent a letter to Vasquez informing her officially that the seized currency was subject to forfeiture because of her failure to report it, in violation of 31 U.S.C. 1101. The letter also informed her that she had the right to petition the District Director of Customs for remission or mitigation of the forfeiture in accordance with 19 U.S.C. 1618 (R. 57).[7] Vasquez, through her attorney,[8] filed a petition for remission or mitigation on

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for the currency report form. Failure to report can result in forfeiture of the monies and civil and criminal penalties (31 USC 1101 *et seq.*).

Several of these posters are prominently displayed above the baggage conveyor belts where passengers wait to claim their baggage prior to Customs examination. Additionally, these same color posters are displayed at eye level in the area where passengers wait to be processed by the Immigration and Naturalization Service (Pet. App. 17a).

[7] "R." refers to the clerk's record on appeal.

[8] Vasquez's attorney previously had informed Customs that she had assigned her rights in the seized property to him. Much later, after the government challenged Vasquez's standing to seek return of the currency, counsel informed the district court that he had released his interest in the currency "other than as to any private agreement he may have with the claimant" (R. 92, 141, 148).

September 25, 1975. The petition asserted that her violation of the law was unintentional because she mistakenly believed that she was required to declare only funds that had been obtained in another country (J.A. 81).

On October 20, 1975, the Customs Office of Investigation assigned Special Agent Janet Pompeo to investigate the petition for remission or mitigation (J.A. 43; Pet. App. 17a). Within a few days, Pompeo had interviewed the customs inspectors who were involved in the seizure of the currency at the Los Angeles International Airport (J.A. 44). She then attempted to contact Vasquez's attorney to arrange an interview with Vasquez. She finally succeeded in contacting the attorney on November 13, 1975, but he was too busy to meet with the agent at that time and stated that he wanted to be present when the agent interviewed his client (J.A. 44-45; Pet. App. 17a).

Thereafter, neither party made any attempt to contact the other until March 2, 1976, when Agent Pompeo again telephoned the attorney. He returned the call two days later and told Pompeo that she could interview his client if she were willing to come to Los Angeles. She agreed, and the interview took place the following day (J.A. 53; R. 110).

On March 29, 1976, Vasquez submitted the affidavit of John Walters (R. 62-64). According to the affidavit, Walters gave Vasquez the money so that she could buy some Canadian property jointly with him. This was the first "innocent" explanation offered for Vasquez's possession of $8,850 while entering the United States *(ibid.)*. On April 26, 1976, Vasquez for the first time (R. 65) expressed a desire for expedition of the administrative decision on the petition for remission.[9]

2. Contemporaneously with these events, Agent Pompeo learned that Vasquez's family was believed to be involved in extensive heroin dealing activities and that Vasquez had a long record of arrests and one conviction for narcotics violations

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[9] At no point did Vasquez request that the currency be placed in an interest bearing account (R. 112). This was in fact done only after the case was on appeal.

(J.A. 46).[10] Pompeo also pursued inquiries with various law enforcement agencies to determine whether the seized currency was part of a narcotics transaction.[11] Because she knew that a currency reporting violation is normally a misdemeanor, but that a reporting violation committed in furtherance of any other offense is a felony,[12] the agent considered it important to ascertain whether or not Vasquez's reporting violation occurred in the course of a drug trafficking scheme (J.A. 47). In late November 1975, Pompeo drafted a preliminary report to the United States Attorney's Office, but her supervisor told her not to forward the report until she had interviewed Vasquez and received responses to her inquiries from other law enforcement agencies, including the Royal Canadian Mounted Police *(ibid.)*. She was in contact with these agencies "quite a few times" during this period but did not receive final reports from them until April 1976 (J.A. 47-48). The other law enforcement agencies could not provide information showing that the currency violation was part of an ongoing criminal activity (Pet. App. 18a).

Agent Pompeo then prepared a final draft of her criminal investigation report, as well as a report relating to the remission petition and potential civil forfeiture action. After the criminal report was reviewed by her supervisor, it was sent to the United States Attorney's Office on May 17, 1976 (R. 110). On June 9, 1976, an Assistant United States Attorney requested Pompeo to reinterview the customs witnesses in the case. She did that and reported her findings on June 10 and 11 (R. 110-111). On June 15, 1976, Pompeo testified before a

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[10] The conviction, for possession and sale of heroin in 1971, was set aside and Vasquez was granted a new trial because the evidence against her was obtained through use of an electronic interception that was not personally authorized by the Attorney General. See *United States* v. *Vasquez*, 348 F. Supp. 532 (C.D. Cal. 1972).

[11] The agent opened a separate criminal file on the case in early November 1975.

[12] Compare 31 U.S.C. 1058 with 31 U.S.C. 1059.

grand jury, which returned an indictment the same day charging Vasquez with knowingly and willfully making false statements to a United States customs officer, in violation of 18 U.S.C. 1001, and with knowingly and willfully transporting $8,850 into the United States without filing a report, in violation of 31 U.S.C. 1058 and 1101 (Pet. App. 18a). The indictment sought forfeiture of the currency as part of the misdemeanor count.

On August 19, 1976, Agent Pompeo informed the District Director that the currency would be used as evidence in the criminal trial. Accordingly, she requested that disposition of the remission petition be withheld until after the currency was no longer needed as evidence (R. 111).

3. The criminal trial did not commence until December 14, 1976 (R. 111).[13] The jury returned its verdicts on December 24, 1976. It found Vasquez guilty on the felony count of making a false statement, but it acquitted her on the misdemeanor charge of willfully failing to file a currency report (Pet. App. 17a).[14] Because of the acquittal on the misdemeanor count, the currency was not subject to forfeiture incident to the criminal proceeding.

On December 28, 1976, Vasquez informed the special agent of the jury's verdicts and renewed her request for expedition of the District Director's decision on the petition for remission or mitigation (R. 66). On March 28, 1977, she was formally notified of the denial of her petition (R. 68).

4. On March 10, 1977, the District Director notified Vasquez that the Customs Service's forfeiture claim had been referred to the United States Attorney for further action (R. 67). A forfeiture complaint was filed in the United States

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[13] The only indication in the record as to why the criminal trial was delayed is that on November 11, 1976, Vasquez's attorney requested a continuance of the trial date until December 14 because he had "not completed his pretrial investigation" (R. 111).

[14] The conviction on the felony count was subsequently reversed because court files were left in the jury room during deliberations. *United States* v. *Vasquez*, 597 F.2d 192 (9th Cir. 1979).

District Court for the Central District of California on March 22, 1977. It alleged that Vasquez had transported the defendant currency into the United States on September 10, 1975, without making the report required by 31 U.S.C. 1101, 31 C.F.R. 103.23(a) and 103.25, and that the currency was accordingly subject to forfeiture under the provisions of 31 U.S.C. 1102 and 31 C.F.R. 103.48 (R. 1-2).

In her answer to the complaint, filed on April 27, 1977, Vasquez admitted the truth of the government's factual allegations (R. 9) but asserted numerous constitutional and other legal defenses. Her "eighth affirmative defense" was that the government's "dilatory processing" of her petition for remission or mitigation and "dilatory" commencement of the civil forfeiture action violated her right to due process (R. 12). Subsequently, Vasquez filed a motion for summary judgment (R. 27-55) arguing, *inter alia*, that the government's delay in passing upon the petition for remission and in instituting the forfeiture action was unreasonable and that such delay violated her right to due process. The summary judgment motion was denied on August 18, 1977 (R. 149-151).

The civil forfeiture trial took place on January 17 and 18, 1978. Counsel stipulated to all of the facts set forth above concerning the events at the Los Angeles Airport on September 10, 1975 (Pet. 12; J.A. 79-81). The only real issue litigated at the trial involved the allegation of unreasonable delay (J.A. 27). Addressing Vasquez's contention that the government had been dilatory in proceeding with the forfeiture action, the district court concluded (J.A. 77):

> * * * I have been anxious to see in this case whether there has been a lot of dilitory *[sic]* conduct that the government has really not done what it should do in order to push this thing with all reasonable speed, and, frankly, I don't see any point in which the government has been lax.
>
> If I had found such, and I found it an unreasonable length of time, I would have been happy to so hold, because I don't like these forfeiture statutes. And, most judges do not, for the reasons I have indicated.

> But, in view of the evidence here, I just cannot see any way in which this Court can say that the government has not pursued their claim in all reasonable diligence.

The court then declared the currency forfeited under 31 U.S.C. 1102 (Pet. App. 19a).[15]

5. A divided panel of the Ninth Circuit reversed (Pet. App. 1a-12a). Proceeding from the premise that "[f]orfeiture actions must be brought promptly" (*id.* at 4a), it found that the government had delayed unreasonably in instituting forfeiture proceedings in this case. In reaching this result, it expressly rejected the government's argument that the pendency of the administrative investigation resulting from the remission petition and of the parallel criminal investigation justified the delay *(ibid.)*.

The majority also rejected the government's argument that, absent a demonstration by Vasquez of prejudice resulting from the delay, she was not entitled to relief. While not specifically addressing the question of remedies, it held that "[t]he claimant need only show unjustified delay in order to bar a judgment of forfeiture" (Pet. App. 5a). It concluded that "[t]o require a further showing of prejudice is inconsistent with th[e] constitutional [principle that forfeiture proceedings be initiated promptly]" (*id.* at 7a).

Judge Alarcon dissented (Pet. App. 8a-12a). Analogizing to principles applicable to motions to dismiss indictments due to

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[15] The court noted that Vasquez's acquittal on the criminal charge under 31 U.S.C. 1058 and 1101 did not collaterally estop the government from seeking forfeiture of the currency because the two actions involved different factual elements and burdens of proof. See *One Lot of Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972).

In order to establish a criminal violation of the currency reporting requirement, the government must prove beyond a reasonable doubt that defendant had knowledge of the requirement and acted willfully in disregard of it. *E.g.*, *United States* v. *Granda*, 565 F.2d 922 (5th Cir. 1978). Willfullness need not be proved in a civil forfeiture action under 31 U.S.C. 1102, and the burden of proof would appear to be on the claimant once the government establishes probable cause. See 19 U.S.C. 1615.

pre-accusation delay, he stated that in order to establish a due process violation the claimant must show both unreasonable delay and prejudice resulting from the delay (*id.* at 10a-11a). Since the claimant here "suffered no prejudice from the delay to her defense in instituting forfeiture proceedings" and was not entitled to the use of the seized currency pending trial of the forfeiture proceedings because it was properly seized at the outset, he would have found that there was no due process violation (*id.* at 11a-12a).

SUMMARY OF ARGUMENT

In this case the Customs Service lawfully seized the respondent currency when claimant Vasquez sought to bring it into the country without making the required declaration. Following a criminal investigation and prosecution of Vasquez growing out of the incident in which the currency was seized, and after denial of her petition for remission or mitigation of the forfeiture, a civil forfeiture action was filed against the currency. In a proceeding the fairness and adequacy of which is unchallenged, the district court reliably determined that the property was subject to forfeiture. The court of appeals nevertheless reversed, holding the forfeiture barred because of unjustified delay in filing the suit. This holding was reached despite the fact that the delay in filing the forfeiture action did not injure or prejudice Vasquez in any way, and despite the fact that the process that she was held to have been denied—prompt filing of a judicial forfeiture action—was never sought by her and would have injured her by terminating the administrative remission proceeding, thereby extinguishing her only realistic prospect for relief from the forfeiture.

I

A. There is no general due process requirement of prompt post-seizure filing of a judicial forfeiture action. Rather, the standard for assessing the timeliness of the suit should be the same as that employed for due process challenges to delay in instituting criminal prosecutions. Such claims can prevail only

upon a showing that delay constituted a deliberate attempt to gain an unfair tactical advantage over the defendant or was undertaken in reckless disregard of its probable prejudicial impact upon the defendant's ability to defend any prosecution ultimately brought. *United States* v. *Lovasco*, 431 U.S. 783 (1977). In the absence of unfair governmental conduct of this sort, the timeliness of the suit is governed by the applicable statute of limitations, which had three and a half years to run at the time the instant forfeiture action was filed.

The reasons for applying the *Lovasco* standard in criminal cases also apply in large part to quasi-criminal forfeitures. In each case, careful investigation is often needed to determine whether proceedings should go forward, and in each case the remedy of dismissal is a drastic one that penalizes important public interests in a manner justifiable only as a response to fundamentally unfair government conduct. Mere failure to proceed with the dispatch that a court believes desirable, or even negligent dilatoriness by the government, is insufficient to make out a constitutional violation.

Among the reasons for not requiring prompt post-seizure filing of a forfeiture action is the interrelationship between forfeiture proceedings and criminal investigations and prosecutions. Where a criminal investigation or prosecution is underway, prompt filing of a forfeiture action is likely to be an empty gesture, because the civil action would normally have to be stayed pending resolution of the criminal proceedings. Failure to stay the civil suit could impair the claimant's ability to defend the civil action, compromise the government's criminal investigation or prosecution by allowing premature discovery, and burden the courts with potentially unnecessary and duplicative litigation of issues that might be settled in a criminal prosecution or through the administrative remission and mitigation process. Under such circumstances, it is inappropriate to hold that due process requires a prompt post-seizure judicial suit.

Even if the government is held to a standard of prompt litigation in the civil forfeiture context, *Lovasco* expressly requires a showing of prejudice as part of any due process claim

complaining about government delay. In this case, where the delay did not impair Vasquez's ability to litigate the forfeiture action, and where it has been fairly and reliably determined that the property was the government's and not hers during the period of the allegedly improper delay, no showing of prejudice is possible.

Finally, even if the analysis of *Lovasco* is rejected for civil forfeiture cases, a claimant's interest in the trial of a forfeiture action cannot be greater than the constitutional speedy trial right of a criminally indicted defendant. Application of the four-factor standard of *Barker* v. *Wingo*, 407 U.S. 514 (1972), compels the conclusion that the delay between seizure and institution of suit in this case does not require dismissal. The delay in no way prejudiced the claimant, she never requested institution of a judicial forfeiture action, and the delay was reasonable in light of the pendency both of administrative remission proceedings and of a criminal investigation and prosecution of the claimant.

B. The only possible ground for distinguishing the present inquiry from that in *Lovasco* is that here the property has been seized, whereas in pre-indictment delay cases the government does not directly deprive the defendant of his liberty prior to the time the prosecution is instituted. Thus, if the property is not in fact subject to forfeiture, the claimant is being deprived of the use of his property during the period of delay. This distinction, however, utterly fails to support the due process holding of the court of appeals.

If a claimant believes his property has been improperly seized—*i.e.*, without probable cause to believe it is subject to forfeiture—he can move for return of the property under Fed. R. Crim. P. 41(e). Thus, the question really is whether due process requires a prompt post-seizure forfeiture hearing for those seizures that are supported by probable cause at the time of the taking—a class of cases in which interim retention of the property by the government is clearly reasonable.

In addition, claimants who consider themselves aggrieved by a delay in filing the judicial forfeiture suit may file an equitable action seeking to compel the seizing agency to file

suit or relinquish the property. *Slocum* v. *Maybery*, 15 U.S. (2 Wheat.) 1 (1817). Since the filing of a forfeiture action will in the vast majority of cases lead to a forfeiture decree, and since the filing has the effect of terminating a pending remission proceeding—which offers most claimants their best (or only) chance to secure return of their property—a prompt litigation requirement is of little interest or value to most persons whose property has been seized for forfeiture. Under these circumstances, it is appropriate to leave it to the claimant whether to invoke these other remedies by which he can challenge the government's interim retention of the property or delay in filing a suit, *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and it is unreasonable to insist on prompt institution of a judicial forfeiture action by the government in every case.

II

Assuming we are mistaken in the foregoing arguments, and the Due Process Clause requires judicial forfeiture proceedings to be brought without unreasonable delay, there was no unreasonable delay in this case, because the 18 months between seizure and suit were consumed with processing Vasquez's remission petition and conducting a criminal investigation and prosecution arising out of her failure to report the currency.

A. So long as a claimant maintains a remission petition, he should not be heard to complain about the government's delay in instituting forfeiture proceedings. Petitions for administrative remission or mitigation are filed in the vast majority of forfeiture seizures and usually result in the grant of some relief acceptable to the claimant. Thus, the congressional scheme that encourages settlement of forfeiture matters administratively rather than judicially in fact succeeds in avoiding substantial congestion of court dockets. The decision of the court of appeals subverts that scheme by refusing to recognize as legitimate delays resulting from the administrative proceedings.

While claimants frequently complain about delays in processing remission petitions, the administrative proceeding is purely a matter of executive grace and implicates no proper-

ty interest subject to the requirements of the Due Process Clause. Consequently, judicial relief from a forfeiture cannot be predicated on delay in processing the petition for remission. For those claimants who prefer judicial proceedings to administrative ones, the simple expedient of withdrawing the request for administrative relief is available, which will normally lead to a prompt filing of a judicial forfeiture action. But so long as claimants, like Vasquez in this case, maintain their request for administrative relief, the delay in litigation is fully justified.

B. Even where an administrative petition is not filed or has been denied, other circumstances may justify some delay in filing suit. Foremost among these is the pendency of a criminal investigation or prosecution relating to the same events giving rise to the forfeiture proceeding. Most of the delay in this case was attributable to that factor. Since it is unreasonable to require simultaneous civil and criminal proceedings involving essentially the same subject matter, the delay in this case was justified.

III

Even if there were a technical violation of Vasquez's due process rights in delaying institution of forfeiture proceedings, the extreme remedy of dismissal of the forfeiture action was improper and conferred a wholly unjustified windfall. Since Vasquez has raised no factual issue relating to the forfeiture, the delay in this case plainly did not prejudice her ability to litigate the forfeiture action. Thus, the only "injury" inflicted upon her by the delay was to postpone the time at which title to the currency was quieted in the United States. The remedy for such a minimal injury is, at most, an award of nominal damages. *Carey* v. *Piphus*, 435 U.S. 247 (1978). Certainly, in the absence of prejudice, dismissal is improper. *United States* v. *Morrison*, 449 U.S. 361 (1981). Moreover, the remedy of dismissal is singularly inapt. While it provides a windfall to those not injured by the delay because their property was in fact forfeitable, it affords no remedy at all for the delay in returning property that is not subject to forfeiture, since return of the property would in any event be ordered in such cases.

ARGUMENT

I. THERE IS NO GENERAL REQUIREMENT IN THE DUE PROCESS CLAUSE OF A PROMPT POST-SEIZURE FILING OF A CIVIL FORFEITURE ACTION

There is no suggestion in this case that the passage of 18 months between the seizure and institution of forfeiture proceedings violated any statute or regulation governing the forfeiture process. The statute of limitations applicable to the filing of customs forfeiture actions requires that they be instituted "within five years after the time when the alleged offense was discovered." 19 U.S.C. 1621. And at the time of the seizure of the currency from Vasquez, 19 U.S.C. 1603 contained no requirement of a prompt report of a seizure by Customs to the United States Attorney for purposes of instituting forfeiture proceedings. Indeed, even as amended in 1978, a prompt report to the United States Attorney is mandated only when legal proceedings "in connection with such seizure or discovery are required * * *." 19 U.S.C. (Supp. IV) 1603. So long as administrative remission proceedings are pending or there is a prospect that the forfeiture will be decreed in a criminal prosecution, it is unclear whether civil forfeiture proceedings will in fact be required. The relief afforded claimant Vasquez by the court of appeals was based solely upon the conclusion that the Fifth Amendment requires more speedy process than Congress has prescribed or than was afforded in the circumstances of this case.

A central purpose of the Due Process Clause is to ensure that the government will not erroneously deprive an individual of his property by affording him an opportunity to show why the action is unwarranted. Hence due process guarantees, at a minimum, notice and an opportunity to be heard, often prior to the actual acquisition of the property, but always before its final deprivation. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The civil forfeiture process involves three stages of potentially improper deprivation of an individual's property interest: first, the actual seizure of the property by the government; second, the retention of the

property until legal title thereto is finally established by the forfeiture action or other means; and third, the judgment declaring the property forfeited and perfecting title in the United States. It is well settled, and not in dispute in this case, that no process is necessary prior to a seizure of property believed to be forfeitable. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Similarly, there is no challenge here to the adequacy of the procedures in the judicial forfeiture proceeding itself. It is the second stage—the interim retention of the seized property pending institution of forfeiture proceedings—that is the focus of the alleged wrong.

Delay during that second stage implicates two distinct interests of the claimant of the property. First, if the original taking was wrongful, then during the period prior to the hearing and eventual return of the property, the claimant has been improperly denied the rightful use of his property. Second, assuming the claimant has a legitimate defense to the forfeiture action, delay may prejudice his ability to offer proof in support of that defense, because as time passes memories may fade or witnesses may become unavailable. See *United States* v. *Marion*, 404 U.S. 307, 321 (1971).

Even in cases like the present one, in which these interests have not been compromised, the Ninth Circuit forbids forfeiture if the government delays in filing suit for some period that the court deems after-the-fact to have been "unreasonable." This rule, however, is a product of the erroneous view that the claimant actually has a significant property interest that can be adequately protected only by a prompt judicial proceeding and that the government has no significant countervailing interest to justify delay.

As we show below, the decision whether and when to bring a civil forfeiture action is often tied to and closely resembles a criminal investigation. In either context, in the absence of invidious motivation for delay and prejudice, mere delay in commencing judicial action does not violate due process. In the forfeiture context, moreover, alternative procedures are available to guard against instances of erroneous seizure or unjustified delay. These factors compel the conclusion that there is no

constitutional requirement for prompt post-seizure filing of civil forfeiture actions.

A. In The Absence Of Invidious Motivation Or Prejudice To The Claimant, The Mere Passage Of Time Between A Seizure And The Institution Of A Forfeiture Action Does Not Violate Due Process

A forfeiture proceeding is quasi-criminal in character. Its object, like that of a criminal prosecution, is to penalize through the civil process the commission of an offense against the law. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965), citing *Boyd* v. *United States*, 116 U.S. 616, 633-634 (1886).[16] Because of the quasi-criminal nature of forfeitures, it is not uncommon, as here, for there to be a substantial overlap between a civil forfeiture investigation and a criminal investigation. Because of this close connection between the two types of investigations, we submit that delay in civil forfeiture actions generally should be dealt with under the same standards employed for delay prior to institution of judicial proceedings in criminal cases.

1. This Court held in *United States* v. *Lovasco*, 431 U.S. 783, 790 (1977), that in pre-indictment delay cases "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." See also *United States* v. *Marion*, 404 U.S. 307, 324-325 (1971); Pet. App. 10a-11a (Alarcon, J., dissenting). Delay attributable to lack of diligence or even negligence on

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[16] Despite the "quasi-criminal" character of such proceedings, however, the innocence of the owner of the property subject to forfeiture is not a defense, since the proceeding is in rem against the article to be forfeited. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 683 (1974); *Goldsmith-Grant Co.* v. *United States*, 254 U.S. 505, 510-511 (1921); *United States* v. *Twenty-Eight "Mighty Payloader" Coin-Operated Gaming Devices*, 623 F.2d 510, 516 (8th Cir. 1980); *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897, 900 (8th Cir. 1977) (collecting cases).

the part of the prosecutor does not provide a basis for a due process claim. Intentional misconduct or reckless disregard for the defendant's interests must be shown.

While title to forfeitable property passes to the government at the time of the offense giving rise to the forfeiture (see page 30, *infra*), for purposes of this part of our argument we assume that after the seizure the claimant retains some residual property interest in the seized property, and that delay could adversely affect the claimant's ability to defeat the forfeiture action. Nonetheless, that interest, although different in nature, certainly is no more significant[17] than the interest of a criminal defendant in not being prejudiced by the loss of material evidence prior to a criminal prosecution in which his liberty will be placed in jeopardy. In *Lovasco* this Court held that an 18-month delay in filing an indictment, which caused a loss of potentially exculpatory evidence and was justified by no more than a generalized and ultimately futile search for additional participants in the crime, gave rise to no claim under the Due Process Clause.

In general, the justifications for delay in bringing forfeiture actions resemble those in criminal prosecutions; indeed, the causes of delay in this case are comparable to those in *Lovasco* and certainly no more subject to condemnation as unfair. Agent Pompeo made inquiries with several other law enforcement agencies, both in this country and in Canada, in order to determine whether Vasquez's conduct was part of a broader narcotics operation. None of those efforts, however, led to any

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[17] In our view the "property" interests of most claimants is easily overestimated. The reason no pre-seizure hearing is required is because the government official typically acts pursuant to plain statutory authority in seizing the property, and therefore the risk of error that is so substantial when private parties dispute over ownership (*Fuentes* v. *Shevin*, 407 U.S. 67, 90 (1972)) has been recognized by this Court to be reasonably low in civil forfeiture cases. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). Thus, the claimant's "interest" generally is more theoretical than real. See note 24, *infra*.

additional evidence for the government against Vasquez. Vasquez argued vigorously before the district court (J.A. 66-67) that all investigations after a month or two subsequent to the seizure were wholly unjustified because no additional evidence relevant to the forfeiture was acquired. Thus, Vasquez and, in turn, the Ninth Circuit basically are of the view "that once the Government has assembled sufficient evidence to prove [forfeiture is warranted], it should be constitutionally required to file charges promptly, even if its investigation of the entire criminal transaction is not complete." *United States* v. *Lovasco*, *supra*, 431 U.S. at 792. This Court in *Lovasco* expressly rejected such a rule for criminal prosecutions, and it should do the same for civil forfeiture actions.

Nothing is gained, and much can be lost, by requiring the civil forfeiture action to be commenced by the government before any related criminal investigation and prosecution is completed. To begin with, commencement of the civil action terminates the claimant's opportunity to obtain remission or mitigation from the Secretary of the Treasury. 19 C.F.R. 171.2(a). Since, typically, remission or mitigation provides the claimant with the best opportunity to recover at least some of his property, early filing of the forfeiture action generally does not benefit the claimant.

In addition, the pendency of a civil action can create significant problems for the claimant. If a criminal prosecution is pending at the same time as the civil forfeiture action, the claimant is placed in the difficult position of having to defend two separate proceedings simultaneously. See *Ivers* v. *United States*, *supra*, 581 F.2d at 1370. Of greater significance, the pendency of the civil action while a criminal prosecution is being considered or pursued gives rise to serious Fifth Amendment problems. Clearly, the claimant has a right not to testify at the civil forfeiture hearing because of the potential use to which that testimony could be put in the criminal proceeding. Such reliance upon the privilege against self-incrimination, however, could seriously impair the claimant's ability to present a defense in the civil case, particularly since the claimant has the burden of proof after the government has established a

prima facie case. See 19 U.S.C. 1615; *United States* v. *One 1976 Mercedes 450 SLC*, 667 F.2d 1171, 1175-1176 (5th Cir. 1982); *United States* v. *U.S. Currency*, 626 F.2d 11, 16 (6th Cir. 1980).

A requirement that a civil suit must be instituted quickly also would impair substantial government interests. First, it is not uncommon that the government must seize property that may be subject to forfeiture in considerable haste, lest the property be removed, concealed or destroyed. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 679. Obviously, the decision whether to go through with a forfeiture action will often call for careful investigation after such a seizure. The government must be afforded full opportunity to sift through the facts and weigh the equities before being required to initiate litigation.

Second, if the forfeiture action is tried and the government loses, that result may collaterally estop the government in a subsequent, related criminal prosecution. See *United States* v. *Mumford*, 630 F.2d 1023, 1027 (4th Cir. 1980), cert. denied, 450 U.S. 1041 (1981); *Dranow* v. *United States*, 307 F.2d 545, 556 (8th Cir. 1962). This backdoor subversion of the policies of *Lovasco* would be particularly unfortunate if the government lost the civil action, having been forced to proceed without pause once it had obtained sufficient evidence to present a prima facie case, and then subsequently discovered additional, inculpatory evidence that could assist in "having the guilty brought to book." *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

Third, the conduct of the civil trial or even the mere pendency of the civil action can give the claimant an unwarranted opportunity to discover the details of a contemplated or pending criminal prosecution. Compare Fed. R. Civ. P. 26(b) with Fed. R. Crim. P. 16. Because of its concern about potential dangers to witnesses and fabrication of defenses, Congress has deliberately elected to circumscribe narrowly discovery in criminal cases; and, of course, details of criminal investigations prior to indictment are generally not available to the public or potential targets. Cf. Fed. R. Crim. P. 6(e). But if a civil

forfeiture action must be filed even while a criminal investigation is in progress, the target of the investigation will naturally seek discovery of material relating to it on the ground that it is necessary to defend the forfeiture action. See *Founding Church of Scientology* v. *Kelley*, 77 F.R.D. 378, 381 (D.C.D.C. 1977); see also *United States* v. *Thirty Six Thousand, One Hundred and Twenty Five Dollars ($36,125.00) In U.S. Currency*, 510 F. Supp. 303, 308 (E.D.La. 1980), aff'd, 642 F.2d 1211 (5th Cir. 1981) (filing of civil forfeiture proceedings during pendency of criminal investigation could have adversely affected that investigation). While the civil forfeiture court can protect against unjustified disclosures by staying discovery proceedings in the civil case,[18] no useful purpose is served by requiring a civil forfeiture action to be filed promptly if the civil action must be stayed to prevent exploitation of the civil discovery rules to gain an advantage in the criminal case.

Moreover, deferral of the civil suit pending the outcome of the criminal proceedings often will conserve scarce judicial resources. Frequently, as in this case, forfeiture is a penalty for the criminal conviction. See, *e.g.*, 31 U.S.C. 1102. Thus, completion of the criminal case will often render the civil case unnecessary. Moreover, if the defendant is acquitted, the government may reconsider whether forfeiture is appropriate and decide to return the property. Even if forfeiture is not available or sought in the criminal case, a successful prosecution may be regarded by the government as sufficient punish-

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[18] Although district courts have sufficient discretion to protect the government's interest, there is no reason to require the courts to engage in the time consuming and difficult process of sorting out the scope of discovery pending the criminal prosecution. See *United States* v. *Mellon Bank, N.A.*, 545 F.2d 869, 873 (3d Cir. 1976) (government's motion for stay of civil proceedings granted where defendant might improperly exploit civil discovery to advance criminal case); *Founding Church of Scientology* v. *Kelley*, *supra*, 77 F.R.D. at 381 (government's interest in preserving secrecy of ongoing criminal investigation outweighed plaintiff's need for information).

ment and pursuit of a civil forfeiture action may be abandoned. In any event, the time and resources of the courts can be conserved by avoiding multiple litigation of the same issues.[19]

Finally, judicial review of the government's diligence in bringing a civil forfeiture action will involve the courts in an unseemly inquiry into "the day-by-day progress of each investigation." *United States* v. *Lovasco*, *supra*, 431 U.S. at 793-794 n.14. See also *United States* v. *Feinberg*, 383 F.2d 60, 67 (2d Cir. 1967), cert. denied, 389 U.S. 1044 (1968). Indeed, the hearing in this case (see J.A. 51, 58-76) is a good illustration of the kind of harassing inquisition of investigating officials

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[19] The opposition to the certiorari petition in the instant case sought (Br. in Opp. 16) to belittle the burdens imposed on the government and the courts by the court of appeals' prompt filing requirement. We urge that these burdens not be underestimated. There are tens of thousands of forfeiture seizures every year, many of which never reach the courts because disposed of administratively (see pages 6-7, *supra*) or otherwise. If a prompt suit had to be filed in many of these cases, however, most would be disposed of by default; as to those cases, the civil suit is of little interest or value to potential claimants. In the remainder of cases, the complaint, even if pro forma, would be followed by an answer and then the inevitable cascade of motions on various procedural matters. The claimant, who may be facing criminal charges, will almost certainly seek discovery. It is equally likely that the government will oppose any efforts to depose potential witnesses for the criminal trial or other attempts to discover the government's case and therefore will seek to stay all discovery. At a minimum, briefs and probably a hearing will be required in many additional cases. Assuming the forfeiture action is stayed, prompt filing becomes an empty gesture. On the other hand, if the government loses on its motions, then its criminal investigation may be seriously jeopardized; in many instances this could impel the government, contrary to Congress's intention, to forego the forfeiture. Nothing in the Due Process Clause requires the government to confront this type of Hobson's Choice or the courts to cope with this influx of relatively trivial litigation.

by a claimant's attorney that the Ninth Circuit's rule fosters and that this Court attempted to discourage in *Lovasco*.[20]

We thus submit that the similarities between a quasi-criminal forfeiture investigation and a criminal investigation and prosecution require the former proceedings to be governed by the same due process standards that are applied to the latter. There can be little question in the present case that the passage of 18 months between the seizure and the filing of the forfeiture action, during much of which the government pursued a broader criminal investigation and allowed a criminal proceeding to be completed, was not the product of bad faith, did not constitute unfair government conduct, and therefore did not offend the requirements of due process.

2. Even if, contrary to our previous submission, the investigation in this case involved governmental misconduct satisfying the first prong of the *Lovasco* formula, a showing of prejudice is also a necessary condition for a due process violation. 431 U.S. at 789. In the forfeiture context, this would require a showing that the delay somehow impeded the claimant's ability to defeat the forfeiture action.[21]

If one thing is clear in this case, it is that the delay was wholly immaterial to the reliability of the forfeiture determination.

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[20] In addition, the need to justify delays to the satisfaction of a court will require investigators to maintain daily records, which obviously "would impose an administrative burden on prosecutors, and reviewing them would place an even greater burden on the courts." *United States* v. *Lovasco*, *supra*, 431 U.S. at 794 n.14. See *United States* v. *Marion*, *supra*, 404 U.S. at 321 n.13.

[21] Some court of appeals' decisions have—incorrectly in our view—stressed the significance to the due process inquiry of the seized property's character as a "wasting asset." *Ivers* v. *United States*, *supra*, 581 F.2d at 1373; *United States* v. *One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977). The nature of the property seized, however, is wholly irrelevant to whether delay violates due process. If the property is properly seized and forfeitable, it makes no difference to the claimant how long the government waits to assume full control of the property. If the property has been wrongfully seized, the right to have the property returned promptly is the same

No factual issue relevant to civil forfeiture existed. In her answer to the complaint, Vasquez admitted that "[o]n September 10, 1975 [she] transported into the United States the defendant currency ($8,850) at [the] Los Angeles Airport without making the report required of her under 31 U.S.C. 1101 * * * " (R. 1, 9). Just as in cases where the defendant enters a plea of guilty that encompasses the commission of every act that the government would have to prove in a civil forfeiture proceeding, the claimant in this case can point to no relevant issue of fact left to be resolved during the forfeiture trial. See, *e.g.*, *United States* v. *Various Pieces of Semiconductor Manufacturing Equipment*, 649 F.2d 606, 607 (8th Cir. 1981).[22] It is clear beyond dispute that Vasquez was in no way prejudiced by the government's delay in filing its civil forfeiture action, and therefore her due process rights were not violated.

3. Even if the Court is not prepared to adopt *Lovasco's* due process analysis in considering the nature of a claimant's right to institution of a forfeiture action at a particular time, it is

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whether the property depreciates, appreciates or remains the same in value. The right is unaffected; only the damages caused by the violation of that right will be altered. Whether currency is or is not a wasting asset therefore is in our view irrelevant to the due process inquiry.

[22] In her Brief in Opposition, respondent asserts that throughout the criminal and forfeiture proceedings she maintained that she lacked knowledge of the reporting requirement (Br. in Opp. 30 n.26). In the first place, as we recounted in our petition (Pet. 6 n.4), she was asked three times whether she or anyone in her party was carrying over $5,000, and responded "no" on each occasion; she made a similar denial to an identical question on a customs form; and there were posters throughout the customs area apprising travelers of the duty to report currency exceeding $5,000 brought into the United States. Thus, her claim is implausible at best. But, whatever uncertainty may exist regarding Vasquez's claimed lack of knowledge of her reporting obligation is wholly irrelevant to any legal issue in this forfeiture proceeding. Section 1102 does not require as a precondition to forfeiture that the individual know that the currency must be reported. See note 1, *supra*.

inconceivable that there is a constitutional obligation to proceed with greater dispatch in instituting a civil forfeiture proceeding to determine title to seized property than in bringing to trial an indicted criminal defendant. But applying the four-factor test of *Barker* v. *Wingo*, 407 U.S. 514 (1972), for evaluating the permissibility of delay under the Speedy Trial Clause of the Sixth Amendment, the delay here was well within acceptable bounds.

The four factors are: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530. The length of the delay in this case is nowhere near the five years in *Barker*, but presumably it is long enough to "trigger" a further inquiry into the other factors. *Ibid.* The reasons for the delay here were to pursue the investigation (which was not expedited by Vasquez's attorney's initial refusal to have her meet promptly with Agent Pompeo) and the pendency of a criminal trial that could have obviated the need for any civil forfeiture action. The civil forfeiture action was filed within three months of the conclusion of the criminal trial, during which time the remission petition was given renewed consideration and was rejected. Balanced against these reasons for delay is the complete failure of claimant to demand or even indicate the slightest interest in the institution of judicial proceedings.[23] Finally, there plainly was no prejudice caused by the delay. Claimant's ability to defend her case was wholly unaffected by the intervening 18 months between seizure and forfeiture (see pages 27-28, *supra*). Thus, even applying the relatively liberal standards for speedy trial claims, the forfeiture trial in this case was not impermissibly delayed.

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[23] Her requests for expedition in the administrative proceeding of course do not constitute an assertion of the relevant right; she had no right to a mitigation decision within any particular time because the administrative process is not subject to any due process requirements (see pages 41-45, *infra*). Moreover, the forfeiture was not barred by the court of appeals because of delay in processing the administrative petition, but because of delay in filing the judicial action.

B. Due Process Requirements Are Fully Satisfied By The Alternative Procedures Available To Test The Lawfulness Of A Forfeiture Seizure Or To Compel The Filing Of An Unreasonably Delayed Judicial Forfeiture Suit

Assuming, contrary to our previous submission, that the standards in *Lovasco* or *Barker* do not control quasi-criminal forfeiture cases, the delay in this case nonetheless did not violate due process as that right has been interpreted by this Court's prior decisions in other civil cases.

1. Initially, we assume that a claimant has a protectible property interest in items lawfully seized for forfeiture. It is, however, important to recognize that "the forfeiture takes effect immediately upon the commission of the act; * * * [and] constitutes a statutory transfer of the right to the United States at the time the offence is committed," although title is not perfected until issuance of a condemnation decree by a court. *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890). See also *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 461 (1868); *United States* v. *Currency Totalling $48,318.08*, 609 F.2d 210, 212-214 (5th Cir. 1980); *Ivers* v. *United States*, 581 F.2d 1362, 1367 (9th Cir. 1978); *Simons* v. *United States*, 541 F.2d 1351, 1352 (9th Cir. 1976). Whether there is any transfer of title depends, of course, on whether it has been reliably determined that the forfeiting act has occurred. Since that is not established at the time of seizure, it is appropriate to treat the claimant's property interest as not extinguished for purposes of considering what process should be afforded.[24]

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[24] Although we assume the existence of a property interest for the purpose of analyzing what process is due, we do not concede that Vasquez was deprived of "property" by the delay between seizure and filing suit. The district court reliably determined that the currency was in fact forfeitable; consequently the government acquired both title and a right to possession of the currency when it was lawfully seized. In retrospect, therefore, it is clear that no property of the claimant was detained; the delay only postponed the government's full use of its own property. This is why dismissal of the forfeiture action is a particularly inappropriate remedy. See pages 46-48, *infra*. Obviously, a retrospective analysis of the existence of a

2. Once the existence of a constitutionally protected interest is established, the issue becomes "what process is due" to protect that interest adequately. *Morrissey* v. *Brewer*, 408 U.S. 471, 483 (1972). With regard to the timing of a hearing, the rule is simply that "the opportunity to be heard" must be after notice is given and " 'at a meaningful time.' " *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976), quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). See also *Parratt* v. *Taylor*, 451 U.S. 527, 539 (1981); *Arnett* v. *Kennedy*, 416 U.S. 134, 179 (1974) (opinion of White, J.); *Phillips* v. *Commissioner*, 283 U.S. 589, 596-597 (1931).

In the instant case, the court of appeals held that the process due claimant Vasquez was not only a judicial hearing at which full opportunity was afforded to determine the facts relating to forfeitability in a reliable manner—which she received from the district court—but also a prompt post-seizure filing of a suit by the government. Insistence upon the latter requirement ignores the availability of other remedies that fully suffice to reduce to an acceptable level the risk of an erroneous deprivation of property arising from a seizure.

We have noted above that forfeiture process embodies three stages: seizure, retention, and final disposition. With respect to the first of these, a procedure has been provided by Congress that is fully adequate to test the lawfulness of the seizure. Rule 41(e) of the Federal Rules of Criminal Procedure provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property on the ground that he is entitled to lawful possession of the property which was illegally seized. * * *

Under this provision, a party challenging the seizure of his property for forfeiture can ordinarily obtain a judicial

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"property" interest is not commonly employed, but it does seem uniquely appropriate where, as here, the issue is simply what consequence to attach to a delay in quieting title to property that at all relevant times in fact belonged to the government.

determination of the existence of probable cause for its seizure.[25] Significantly, the showing of probable cause in a Rule 41(e) proceeding is essentially equivalent to the government's burden of proof in the forfeiture action. See 19 U.S.C. 1615.

Of course, there is not a complete correspondence of issues between a Rule 41(e) proceeding and the forfeiture action. See generally *United States* v. *Wilson*, 540 F.2d 1100, 1103 & n.4 (D.C. Cir. 1976), citing, American Law Institute, *A Model Code of Pre-Arraignment Procedure* S S 280.3 (1975). The former focuses only on the lawfulness of the seizure in light of the officers' information when they obtained the property, whereas in some cases the claimant may have some affirmative defense, based on facts unknown to the seizing officers, that would suffice to defeat the forfeiture even though the seizure was supported by probable cause. Nevertheless, the availability of the Rule 41(e) remedy clearly affords adequate process to guard against unjustified seizures and to root out most instances in which seized property cannot ultimately be shown to be forfeitable. Cf. *Parratt* v. *Taylor*, *supra*, 451 U.S. at 539. Prompt filing of a civil forfeiture action is thus unnecessary to achieve these ends.

The availability of the Rule 41(e) remedy as a means of weeding out cases in which the initial seizure of the property is illegal defines more precisely the present due process inquiry: To what extent, if at all, is prompt filing of a judicial forfeiture action required in the case of property lawfully seized on the basis of probable cause to believe it is subject to forfeiture?

Given the lawfulness of the seizure, the forfeiture process followed by Customs clearly complies with the requirements for reasonable notice and opportunity for a hearing. Notice of forfeiture is given immediately after the seizure of property to

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[25] There may be reasons why a district court would not immediately hear and determine the merits of a Rule 41(e) motion respecting property seized for forfeiture. But the court's consideration whether to review the lawfulness of a seizure or defer such a determination itself constitutes "process" guarding against the hazard of unjustified governmental invasion of private property interests.

anyone with an apparent interest in the seized property. That notice provides two distinct "opportunities" for a hearing. The claimant can either seek affirmative administrative relief through the relatively informal remission or mitigation process (see pages 6-7, *supra*)[26] or await the filing of the civil forfeiture action and attempt to defend against it in court.

In addition, whether the final hearing is at a "meaningful time" is a matter largely within the control of the claimant and is not dependent on suit being filed by the government. It has been accepted from the earliest days that the proper response to the government's failure to proceed with a forfeiture action with sufficient dispatch to satisfy the claimant is to file an equitable action seeking an order compelling the filing of the forfeiture action or return of the seized property.[27] See *Slocum* v. *Mayberry*, 15 U.S. (2 Wheat.) 1, 9 (1817) (Marshall, C.J.); *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, 530 F.2d 672, 674-675 (5th Cir. 1976); *In re Behrens*, 39 F.2d 561, 563 (2d Cir. 1930); *The Blairmore I*, 10 F.2d 35, 38 (2d Cir. 1925) ("In the century and more that has elapsed since [*Slocum*], * * * the rule is the same"); *Gillam* v. *Parker*, 19 F.2d 358, 361-362 (E.D.S.C. 1927). It thus cannot fairly be concluded that adequate opportunity to secure a timely hearing is not available. Under such circumstances claimants, such as Vasquez, who never evidence the least interest in having a suit filed and "who stand by mutely while time passes * * * [should] not later be heard to complain of prejudicial delay." *Ivers* v.

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[26] If the claimant is denied relief through this process, he still can contest the forfeiture in the civil action that the government is statutorily required to file in order to perfect its interest in the seized proper

[27] We do not concede that the mere filing of an equitable claim will invariably entitle the claimant to an order compelling the filing of a forfeiture action. There may be strong reasons why the government should be allowed to defer its suit, *e.g.*, a pending criminal investigation; but if the delay is simply bureaucratic foot-dragging, then the equitable action should result in a speedy resolution of the forfeiture issue.

United States, *supra*, 581 F.2d at 1373. See also *United States* v. *One 1973 Ford LTD*, 409 F. Supp. 741, 742 (D. Nev. 1976).[28]

3. Contrary to the well accepted notion that due process "is not a technical conception with fixed content unrelated to time, place and circumstances," *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 334, the court of appeals in this case adopted an unbending approach to forfeiture and concluded that, regardless of the government's reasons for delay, "[a] prompt hearing is constitutionally guaranteed to the owner of currency * * *" (Pet. App. 8a).[29] This holding is justified initially by the line of cases from this Court declaring generally that a hearing must precede the deprivation of property. See, *e.g.*, *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Fuentes* v. *Shevin*, 407 U.S. 67, 90-92 (1972). But cases such as *Fuentes*, which say nothing at all about the timing of post-deprivation hearings, are not valid guides for deciding the requisites of due process in civil forfeiture proceedings. This Court recognized as much in *Calero-Toledo*, when it held that no pre-seizure hearing was necessary, in part, because the seizure, itself, is initiated by "a governmental official responsible for determining under the standards of a narrowly drawn

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[28] The Ninth Circuit assumes that the filing of a civil forfeiture action is a panacea for the claimant's problems, but the filing of the complaint alone does very little to help the claimant. Certainly, if the government is pursuing a criminal investigation or prosecution, it will attempt to stay the civil action (see pages 24-25, *supra*). Even if the cases goes forward, it will be some time before the case is finally resolved and, if the claimant wins, the property is returned. For instance, in this case there was an eleven-month delay between the filing of the complaint and the judgment by the district court. In addition, there was a 13-month delay between the time the case was submitted on appeal and the court of appeals decided it. Thus, the filing of the forfeiture action, which the court of appeals regarded as crucial, is more realistically viewed as a relatively small step toward reacquisition of the property.

[29] The Ninth Circuit does recognize that if the delay is caused by the claimant there is no due process violation. See *United States* v. *Di Rodio*, 565 F.2d 573 (9th Cir. 1977).

statute, that it was necessary and justified" in this case. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, *supra*, 416 U.S. at 678, quoting *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 91. Since other post-seizure process is available to test the initial lawfulness of the seizure (see pages 31-32, *supra*), decisions like *Fuentes* provide little support for the court of appeals here.

Although it was not relied upon expressly by the court of appeals in this case, other courts that have held that forfeiture proceedings must be brought promptly have based their holdings upon this Court's decision in *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363 (1971). See, *e.g.*, *Ivers* v. *United States*, *supra*, 581 F.2d at 1368 (collecting cases); *Sarkisian* v. *United States*, 472 F.2d 468, 471-472 (10th Cir.), cert. denied, 414 U.S. 976 (1973); *United States* v. *Thirty-Six Thousand, One Hundred and Twenty-Five Dollars ($36,125.00) in U.S. Currency*, *supra*, 510 F. Supp. at 307. *Thirty-Seven Photographs*, however, is plainly distinguishable from this case. In *Thirty-Seven Photographs*, the Court reviewed the procedures of the Customs Service in seizing objects determined by a customs inspector to be "obscene." Relying upon its prior decisions requiring prompt governmental action when dealing with prior restraints of potentially protected First Amendment activity (*e.g.*, *Blount* v. *Rizzi*, 400 U.S. 410 (1971); *Teitel Film Corp.* v. *Cusack*, 390 U.S. 139 (1968); *Freedman* v. *Maryland*, 380 U.S. 51 (1965)), the Court read into 19 U.S.C. 1305(a) a requirement that a judicial forfeiture proceeding for allegedly obscene material be commenced within 14 days of seizure and completed not more than 60 days later. Both requirements had been satisfied in that case. The purpose of these time limits was to obtain a prompt judicial determination as to whether the seized material was, in fact, obscene[30] and thereby to safeguard the importer's First

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[30] One other obvious distinction between *Thirty-Seven Photographs* and this case is the difference in the usefulness of a hearing. Whether the pictures were "obscene" was a vigorously contested issue that required adjudication. In this case, whether the claimant failed to declare this currency is not disputed at all and therefore requires no hearing.

Amendment rights. As one court of appeals has properly recognized: "[t]he overriding Constitional concern of the Court in *Thirty-Seven Photographs* was * * * the First Amendment, a consideration obviously not present here." *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, *supra*, 530 F.2d at 676 n.7. The Court's holding in *Thirty-Seven Photographs* thus creates no basis for holding that a prompt hearing is necessary where the property seizure implicates no First Amendment interests.

4. The gist of our due process submission can be neatly summarized by reference to the three-factor "balancing test" described by this Court in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

We already have discussed some of the reasons why the government delays filing forfeiture suits, *e.g.*, to investigate thoroughly facts bearing on the forfeitability of the property, to avoid imposing unnecessary burdens on the claimant, to protect any ongoing criminal investigations, and to conserve judicial resources by avoiding litigation when the matter may be settled by a grant of administrative relief or the outcome of a criminal prosecution. Obviously, an additional cause for the delay is the finite manpower and resources available to process forfeiture matters.

The magnitude of the private interest is fairly limited following the seizure. As noted above, if the property has been used in the commission of an offense giving rise to the forfeiture, as is true in most cases, title has already passed to the United States prior to any period of delay. Moreover, given the availability of the Rule 41(e) remedy for cases of illegal seizures, the private property interest is further limited by the fact that the

delay occurs during a period in which there is usually probable cause to believe the property is subject to forfeiture.

Finally, the requirement that a forfeiture action be filed promptly is not essential, or even particularly useful, as a means of reducing the risk of an erroneous determination of the issue of forfeitability. In those instances in which there is a genuine factual basis for disputing the seizure or the forfeiture, claimants—virtually all of whom are represented by private counsel—will pursue the remedies available under Rule 41(e) or an equitable suit to compel the filing of the forfeiture action. If neither of these avenues of redress is pursued, it is almost certainly because, as in this case, the factual basis for forfeiture is indisputable. In such a situation, delay will in no way increase the risk of error. In claimant's case, whether the suit was filed on the day of the seizure or five years later, on the last day permitted by the statute of limitations, the result would be the same because there is no factual dispute that requires fresh evidence to decide her claim properly.

II. ASSUMING THERE IS A GENERAL DUE PROCESS RIGHT TO A PROMPT JUDICIAL HEARING, DELAY IN FILING THE CIVIL FORFEITURE ACTION WAS NEVERTHELESS FULLY JUSTIFIED IN THIS CASE

A. The Time For Filing Suit Should Be Tolled During The Entire Period A Claimant Voluntarily Seeks Administrative Remission Or Mitigation Of A Forfeiture

1. Under 31 U.S.C. 1104, the Secretary of the Treasury "may in his discretion remit any forfeiture or penalty * * * in whole or in part upon such terms and conditions as he deems reasonable and just." As we have explained previously (page 5, *supra*), following seizure of property for a customs violation, any person having an interest in the seized property is informed of the property's liability to forfeiture and of the right to petition the Secretary for remission or mitigation of the forfeiture. In the overwhelming majority of cases, because the government's entitlement to the property is clear from the circumstances of the seizure, the claimant's only prospect for

reacquiring the property is that the Secretary will favorably exercise his discretion and allow remission or mitigation. In fact, petitions are filed in approximately 90% of all Customs forfeiture cases and at least partial relief is granted in a majority of them. See page 6, *supra*.

We submit that there are compelling reasons for holding that submission of an administrative petition for remission or mitigation completely tolls the time within which the government must file a civil forfeiture action. Although the Ninth Circuit ultimately rejected this argument in *Ivers* v. *United States*, *supra*, 581 F.2d at 1370, it convincingly articulated the reasons supporting the adoption of such a rule:

> There are a number of good policy reasons why a procedural sequence in which the administrative determination precedes institution of judicial proceedings may be preferred. Administrative proceedings generally involve less formality and less cost than their judicial counterparts. Since requests for remissions of forfeitures are frequently granted, obviating any need for judicial action, unnecessary and burdensome court proceedings may be avoided by allowing the administrative process to occur first. This sequence, moreover, spares litigants the hardships which simultaneous administrative and judicial proceedings might impose, especially where, as here, a litigant is involved in defending himself against criminal charges.

Accord, *White* v. *Acree*, 594 F.2d 1385, 1390 (10th Cir. 1979); see *United States* v. *One Motor Yacht Named Mercury*, 527 F.2d 1112, 1114 (1st Cir. 1975); *United States* v. *One 1964 MG*, 408 F. Supp. 1025, 1029 (W.D. Wash. 1976).

The decisions of the Ninth Circuit in *Ivers* and in the instant case seem to suggest that the pendency of an administrative remission proceeding is not to be considered in determining whether delay in filing a judicial forfeiture action was justified. Such a principle has drastic adverse consequences since it places great pressure on the government, if it wishes to safeguard its power to forfeit property, to cut off the administrative proceedings and file a judicial action. In view of the fact that thousands of forfeiture seizures are made by the federal

government each year, such a rule would threaten to burden court dockets with much unnecessary litigation.

Even if the court of appeals should be understood to allow the executive a reasonable time for processing remission petitions, serious problems persist. The administrative agency has no way of knowing what amount of time might later be considered reasonable by the courts. Indeed, because of the strain that enormous numbers of remission petitions place on the limited manpower available to process them, it can be predicted with some confidence that the speed in processing petitions will frequently be found by a court, which looks only at the single case before it, to have been unreasonably slow. All in all, the court of appeals' uncharitable attitude toward the government's arguments seeking to justify delay in going to court because of the pendency of administrative proceedings seriously subverts the efficacy of the remission/mitigation process.

The Ninth Circuit's approach, by undermining the viability of the remission/mitigation process, is squarely at odds with the historical congressional policy favoring administrative resolution of claims resulting from Customs seizures. In 1938, Section 1603 of the Tariff Act of 1930 was amended by deleting the requirement that customs violations or seizures resulting therefrom be referred to the United States Attorney "promptly,"[31] and by adding a provision that such referral should be made only where "legal proceedings by the United States Attorney * * * are required * * *." Act of June 25, 1938 Section 27, 52 Stat. 1089. The purpose of this amendment was to make clear that only cases that could not be resolved administratively should be referred to the U.S. Attorney for the

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[31] The historical purpose of the promptness language in 19 U.S.C. 1602-1604 was not to protect claimants' "due process" rights that were as yet unforeseen but rather to insure that federal revenues were collected in a timely fashion. When the provisions were originally enacted, customs duties were the principal source of federal revenue. *United States* v. *Laurenti*, 581 F.2d 37, 41 n.12 (2d Cir. 1978), cert. denied, 440 U.S. 958 (1979).

initiation of judicial proceedings. H.R. Rep. No. 1429, 75th Cong., 1st Sess. 5 (1937); S. Rep. No. 1465, 75th Cong., 3d Sess. 11 (1938).[32]

The congressional preference for administrative disposition of such claims was reaffirmed in the Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, 92 Stat. 888 *et seq.* Although the Act reinstated the requirement that customs officers report customs violations or seizures to the United States Attorney "promptly," it retained the provision that such action is necessary only when judicial proceedings are required—a matter that cannot be ascertained while administrative remission proceedings are pending. The legislative history of the 1978 amendment to Section 1603 confirms that the purpose of this revision was to require "prompt" initiation of judicial proceedings, but only after the administrative process was complete. Referring to the amendment, the House Report explained:

> Currently, after the penalty is assessed, the individual involved has 60 days to file a petition for administrative review. The object [of the amendment] is to have such cases referred immediately to the U.S. Attorney *if no petition is filed.* This provision will insure that a violator will have an opportunity to secure judicial review *as soon as the period for administrative review has elapsed.*

H.R. Rep. No. 95-621, 95th Cong., 1st Sess. 11 (1977) (emphasis added).

Due process does not require discarding the congressional scheme of deferring initiation of judicial proceedings pending

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[32] A section-by-section analysis of the bill submitted by the Treasury Department stated (*Hearings on H.R. 6738 Before the House Comm. on Ways and Means*, 75th Cong., 1st Sess. 138 (1937)):

> The provisions of section 603 of the Tariff Act of 1930 * * * make it the duty of the collectors of customs to report to the Solicitor of the Treasury and to the local United States Attorney all seizures of merchandise made for violation of the customs laws. Since legal proceedings are not necessary in connection with many seizures, it is proposed to require reports to be made to the United States attorneys only in cases in which legal proceedings are required.

resolution of the claimant's administrative petition. As we have explained, the only realistic hope most claimants have of reacquiring their seized property lies in favorable action by Customs on their petitions for remission or mitigation; the circumstances of the seizure of the property are usually such that judicial proceedings will inevitably result in forfeiture. Absent some indication to the contrary, it is reasonable to assume that claimants who file such petitions desire postponement of the initiation of judicial forfeiture proceedings until after an administrative decision has been rendered. As the court explained in *White* v. *Acree*, *supra*, 594 F.2d at 1390:

> [W]here parties file for administrative relief, without asking for institution of court proceedings on the legal issues, they may not complain of abridgment of their rights to procedural due process during a reasonable period for investigation or until their sooner demand for forfeiture proceedings or suit brought to recover the property. In other words, they may forego their right to a quick hearing, if such may reasonably be inferred from their actions.

See also *Ivers* v. *United States*, *supra*, 581 F.2d at 1372. If a claimant is dissatisfied with the length of time taken by Customs in acting on his administrative petition or desires a prompt judicial determination, all he need do is withdraw the petition, which will ordinarily lead to prompt institution of judicial forfeiture proceedings. See 19 C.F.R. 162.32 (1975).[33]

2. So long as a claimant maintains his administrative petition, we submit that there is no time limit within which a

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[33] We note parenthetically that it cannot always be assured that action on petitions for remission or mitigation will be prompt enough to suit all courts or claimants. In the first place, the sheer number of such petitions coupled with the limited manpower of the Customs Service precludes these cases from being disposed of as rapidly as they might be. Moreover, the administrative process, with its focus on equitable reasons for granting relief, is inherently more time consuming than a judicial forfeiture proceeding in which the government's entitlement to the seized property is either beyond dispute or dependent upon the resolution of a simple factual question.

decision must be rendered. We recognize that a number of courts have held that due process requires Customs to take prompt action on petitions for remission or mitigation. See *Von Neumann* v. *United States*, 660 F.2d 1319, 1324-1326 (9th Cir. 1981); *Lee* v. *Thornton*, 538 F.2d 27, 31 (2d Cir. 1976); *United States* v. *A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D. Cal. 1974); *United States* v. *One 1971 Opel G.T.*, 360 F. Supp. 638, 640-641 (C.D. Cal. 1973). Indeed, in the district court, the primary thrust of Vasquez's due process claim was that the government had taken too long to act on her administrative petition (R. 39-48). Moreover, because much of the delay in this case was the result of Customs' investigation of the administrative petition, the clear implication of the court of appeals' decision is that Vasquez had some right to a prompt disposition of her petition.[34] Under this Court's prior decisions, however, it is clear that petitions for remission or mitigation of forfeitures are not subject to any due process or "speedy trial" requirements, and the lower court decisions to the contrary are incorrect.

The procedural protections of the Due Process Clause do not extend to all situations in which governmental action or inaction may be adverse to the interests of a particular person or group:

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decisionmaking must comply with standards that assure error-free determinations.

Greenholtz v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7 (1979), quoting *Meachum* v. *Fano*, 427 U.S. 215, 224 (1976). By its terms, the Clause applies only in those circumstances in which governmental action threatens to deprive a person of "liberty" or "property." *Board of Regents* v. *Roth*, 408 U.S. 564, 571 (1972).

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[34] The court of appeals specifically noted her attorney's requests that the administrative petition be speedily resolved (Pet. App. 4a).

The decisions of this Court make it clear that the government creates a property interest cognizable under the Fifth Amendment only when by statute, regulation, rule, or well-established practice it binds itself to confer a benefit or withhold a sanction on the determination of a particular set of facts. But, as the Court explained in *Roth*:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He, must, instead, have a legitimate claim of entitlement to it.

408 U.S. at 577. See, *e.g.*, *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458, 462-467 (1981); *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, 442 U.S. at 7; *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976); *Meachum* v. *Fano*, *supra*, 427 U.S. at 226; *Montanye* v. *Haymes*, 427 U.S. 236, 242 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539, 557-558 (1974).

Applying this analysis in *Connecticut Board of Pardons* v. *Dumschat*, *supra*, 452 U.S. at 465, this Court recently held that a prisoner serving a life sentence has no liberty interest at stake in the decision whether to commute his sentence, because "[t]he [commutation] petition * * * is nothing more than an appeal for clemency. * * * In terms of the Due Process Clause, a * * * felon's expectation that a lawfully imposed sentence will be commuted or pardoned is no more substantial than an inmate's expectation, for example, that he will not be transferred to another prison; it is simply a unilateral hope" (footnote omitted). See also *Meachum* v. *Fano*, *supra*, 427 U.S. at 226-229 (state law conferred no right on prisoner to remain in the prison to which he was initially assigned; no pre-transfer hearing required); *Montanye* v. *Haymes*, *supra*, 427 U.S. at 242 (same); *Board of Regents* v. *Roth*, *supra*, 408 U.S. at 577-578 (interest in continued employment not a property interest to which due process rights attach); *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (opinion of White, J.).

Applying these principles to the remission or mitigation process, it is plain that remission is a matter of executive grace and not designed to create any "property" interest protected

by the Due Process Clause. Over 150 years ago in *United States* v. *Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825), this Court described the Customs remission process, enacted by the First Congress, Act of May 26, 1790, ch. 12, 1 Stat. 122, as a "matter submitted to [the Secretary of the Treasury's] sound discretion." Indeed, the Court's description of the remission process is identical to a pardon: "It presupposes, that the offense has been committed, * * * and affords relief for inadvertances and unintentional error." 23 U.S. (10 Wheat.) at 291. Compare *Schick* v. *Reed*, 419 U.S. 256, 266 (1974); *The Federalist* No. 74, at 500-501 (J. Cooke ed. 1961), quoted at 419 U.S. at 263 n.6.

The understanding that remission and mitigation are wholly a matter of discretion that establishes no entitlement in the claimant is clearly expressed by the remission or mitigation provision in the Bank Secrecy Act. Section 1104 provides: "The Secretary *may in his discretion* remit any forfeiture * * * in whole or in part *upon such terms and conditions as he deems reasonable and just*" (emphasis added).[35] This statute, like the sentence commutation statute considered in *Dumschat*, grants the claimant no more than the ability to petition for clemency; the actual decision whether to grant remission or mitigation and the proper terms of such relief are left to the unfettered discretion of the Secretary.[36] In a manner similar to that of a

[35] In similar terms, 19 U.S.C. 1618, which governs remission or mitigation of penalties resulting from violations of the Tariff Act of 1930, states that "the Secretary of the Treasury, if he finds that such * * * forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such * * * forfeiture, *may* remit or mitigate the same *upon such terms and conditions as he deems reasonable and just* * * * " (emphasis added).

[36] For this reason the courts have held that they lack jurisdiction to review the action of the Secretary on a petition for remission or mitigation. See *United States* v. *One 1973 Buick Riviera Automobile*, 560 F.2d 897 (8th Cir. 1977); *Wiren* v. *Eide*, 542 F.2d 757 (9th Cir. 1976); *United States* v. *One 1971 Buick Riviera*, 463 F.2d 1168 (5th Cir. 1972), cert. denied, 409 U.S. 980 (1972); *United States* v. *One 1961 Cadillac*, 337 F.2d 730 (6th Cir. 1964).

state parole board, he is empowered to remit or mitigate forfeitures upon such terms as he deems "reasonable and just" when he finds that the existence of mitigating circumstances warrant such relief. There is no particular set of facts which, if shown, mandate a decision favorable to the claimant. See *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, *supra*, 442 U.S. at 10.

Given the absence of a judicially cognizable property interest in remission or mitigation, claimants who petition the Secretary for such relief have no entitlement under the Due Process Clause to prompt action upon their petitions. They do have the right to withdraw the petition, but if they decline to exercise that option, they should not be heard to complain about how the long government takes in deciding whether to grant them a windfall remission or how long the government takes in filing the action while considering whether administrative relief is warranted. Indeed, in this case, it is transparently clear that Vasquez would *not* have wanted the relief that the court held she was unconstitutionally denied, because early filing of a forfeiture action would have foreclosed her only realistic prospect for relief.

B. The Government Should Be Excused From Filing A Civil Forfeiture Action For The Period During Which It Is Conducting A Criminal Investigation Or Prosecution Relating To The Seized Property

In point I of this brief, we argued that the delay attending the government's investigation prior to filing a civil forfeiture action should be reviewed under the same due process standards adopted in *United States* v. *Lovasco* for delay pending accusation in a criminal prosecution, and therefore there should be no general requirement of a prompt judicial proceeding. If, contrary to that submission, the Court holds that due process does require the government to justify any delay in filing suit, the pendency of a related criminal investigation or prosecution should be recognized as a legitimate justification.

The reasons for this conclusion have been largely canvassed above (see pages 22-27, *supra*). During the delay, the claimant

retains the option of seeking administrative relief, avoids having to litigate simultaneously in two separate proceedings, and may be in a better position to defend the forfeiture action once the criminal aspects of the case are resolved. From the government's perspective, the civil suit might serve as an unwarranted estoppel against further prosecutions; and it may provide improper opportunities for the claimant to discover both the extent of any criminal investigation and the evidence the government plans to use in a possible future criminal prosecution. Finally, the criminal proceeding may eliminate the need to pursue a civil forfeiture action, thereby sparing the courts from having to litigate the same issue twice.

Indeed, except for the Ninth Circuit in this case, most courts have readily recognized that a criminal investigation fully justifies delay in filing a civil forfeiture suit. See, *e.g.*, *United States* v. *One 1976 Mercedes 450 SLC*, 667 F.2d 1171, 1175 (5th Cir. 1982); *Shea* v. *Gabriel*, 520 F.2d 879, 880, 882 (1st Cir. 1975); *United States* v. *Thirty-Six Thousand, One Hundred and Twenty-Five Dollars ($36,125.00) in U.S. Currency*, *supra*, 510 F. Supp. 303, 308 (E.D. La. 1980), aff'd, 642 F.2d 211 (5th Cir. 1981); *United States* v. *$40,454 in United States Currency*, 469 F. Supp. 1041, 1044 (W.D. Pa. 1979) (four year delay between seizure of currency and institution of forfeiture proceedings not violative of due process where money necessary as evidence in intervening criminal proceeding); *United States* v. *One 1973 Dodge Van*, 416 F. Supp. 43, 47 (E.D. Mich. 1976). We therefore submit that the 18-month delay, during most of which the government actively investigated Vasquez's potential criminal activity and vigorously prosecuted here for the apparent commission of a crime, was completely justified.

III. ASSUMING THAT THE DELAY IN THIS CASE VIOLATED DUE PROCESS REQUIREMENTS, DISMISSAL OF THE FORFEITURE ACTION BROUGHT BY THE UNITED STATES AGAINST THE SEIZED CURRENCY IS AN INAPPROPRIATE REMEDY

In the preceding arguments we have contended that the Due Process Clause does not require a forfeiture hearing at a par-

ticular time and that, in any event, where the claimant files a petition for remission or mitigation or the government pursues criminal process, such actions toll any obligation to initiate civil forfeiture proceedings. Assuming that we are incorrect and the government has an obligation under the Due Process Clause to initiate judicial forfeiture proceedings promptly, and that it has failed in this case to justify the delay, dismissal of the civil forfeiture action is nevertheless a wholly inappropriate remedy for that violation. In the absence of any showing by the claimant that the delay materially prejudiced her ability to present a defense, it is unreasonable to terminate the government's right to forfeit property, just as in cases like *Fuentes* v. *Shevin* the presence of a due process violation does not serve to extinguish the underlying debt.

Dismissal of the forfeiture action is the civil equivalent of dismissal of a criminal defendant's indictment. In the latter situation, this Court has made clear that "absent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliberate. This has been the result reached where a Fifth Amendment violation has occurred * * *." *United States* v. *Morrison*, 449 U.S. 361, 365-366 (1981); footnote omitted. See also *United States* v. *Lovasco*, *supra*, 431 U.S. at 790; *United States* v. *Marion*, *supra*, 404 U.S. at 324.

Absent prejudice to the claimant's ability to contest a forfeiture, it is clear that dismissal of the forfeiture action in no way remedies any injury that improper delay may have caused. Since neither the lawfulness of the original seizure nor the reliability of the ultimate judicial determination of forfeiture is implicated, the injury to the claimant from nonprejudicial delay is only that of being forced to wait for some period of time before the seized property is finally declared forfeited. The violation of that "right" can be remedied completely in the form of damages for any injury caused by the delay, which would be no more than a nominal sum when the property was in fact subject to forfeiture. See *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978). What the Ninth Circuit has done is to grant the claimant a windfall at the expense of the

congressional purpose to strike at crime through the pocketbook of the criminal.[37]

The illogic of the Ninth Circuit's remedy is highlighted by considering its complete inefficacy in the situation in which the property is not forfeitable and the delay has deprived its owner of interim possession. In such a case, dismissal would be granted in any event, without regard to the due process violation, while in the interim the claimant has suffered an injury that the dismissal leaves wholly unremedied. The Ninth Circuit's approach is reasonable only for the rare situation where the claimant has an arguable defense to forfeiture that has been impaired by the passage of time. See *United States* v. *Lovasco*, *supra*, 431 U.S. at 790. But that plainly is not this case, and neither reason nor policy justifies use of the most extreme remedy in the situation involving the least significant violation. Cf. *United States* v. *Morrison*, *supra*, 449 U.S. at 366 n.2. The court of appeals erred in dismissing this forfeiture action.

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[37] "Enforcement officers of the Government have found that one of the best ways to strike at commercialized crime is through the pocketbooks of the criminals who engage in it." H.R. Rep. No. 2751, 81st Cong., 2d Sess. 3 (1950). See also *Berkowitz* v. *United States*, 340 F.2d 168, 170 (1st Cir. 1965); Smith, *Modern Forfeiture Law and Policy: A Proposal for Reform*, 19 Wm. & Mary L. Rev. 661, 662 (1978).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Respondent's Brief

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, *Petitioner*,

v.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF FOR RESPONDENT (CLAIMANT)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1062

UNITED STATES OF AMERICA, *Petitioner*,

v.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT (CLAIMANT)

STATEMENT

Facts Of This Case

1. On September 7, 1975, Mary Josephine Vasquez, and Anthony Varela flew from Los Angeles by way of Seattle to Vancouver, Canada, to view real property (Tr. 637, 640-41, 645).[1] It was claimant's first trip to Canada, and apparently the first time she had flown in or out of the United States (Tr.

[1] "Tr." refers to the reporter's transcript of Vasquez' companion criminal case (CR 76-781 AAH). Portions of the criminal trial testimony were incorporated into the record of this case by stipulation (J.A. 84-85). A copy of the criminal transcript has been lodged with this Court, and the Solicitor General has been provided a copy.

638-39).[2] She carried approximately $9,000 in cash for deposit on the property (Tr. 639-40, 647).[3]

When Vasquez departed Seattle on her first international flight, she, like many travelers, was unaware of a recently enacted law requiring her to file an IRS Form 4790 reporting the more than $5,000 she carried (Tr. 74-75, 407, 545-48). Vasquez was not asked to report the currency when she left Seattle (Tr. 405, 645).[4] In Seattle, no posters, forms or Customs officials notified her of this novel reporting requirement for property not subject to duty or tax on re-entry and not acquired abroad (Tr. 645-46).

The trip, intended in part to be a needed vacation for the then 46-year old widow with five children, turned into a nightmare when she returned to the United States on September 10, 1975 (Tr. 648). On her return, Vasquez treated herself to first-class champagne flight, and drank Bloody Marys (Tr. 660). During the flight, a stewardess gave Varela a Customs Declaration Form (Tr. 653).[5] The form stated: "I certify that I have declared all items acquired abroad . . ." (Tr. 408-09, 524).[6] The form did not state the new federal obligation to declare non-dutiable United States currency acquired here and transported abroad three days earlier (Tr. 524). Varela read the

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[2] Vasquez had made previous car trips to Tijuana, Mexico (Tr. 638-39).

[3] Vasquez kept the money in her bra while traveling in and out of the United States because she felt it was safe there (Tr. 87, 650).

[4] This was the basis for our previous assertion that Vasquez "was apparently not required to report the money when she left the United States" (Br. in Opp. 3).

The district judge expressed on several occasions his ignorance of the law and the confusing nature of the reporting form. (Tr. 50, 545, 889, 899-900, 940).

[5] Customs Form-659(b) (Tr. 554).

[6] At one point on the form, the word "ALL" is printed in capital letters (Tr. 524).

ambiguous Customs form to Vasquez. Claimant, who had not completed high school, was apparently temporarily without her eyeglasses (Tr. 236, 410, 653-57). Varela botched the answers to many of the form's questions as Customs officials testified travelers commonly do (Tr. 236-39, 515-18).[7] Vasquez and Varela understood the Customs declaration form to mean what it said, i.e., that they were required to declare all items *acquired* in Canada (Tr. 407, 524, 656, 705-06).[8] Claimant signed the form apparently without reading it (Tr. 657).[9]

2. When Vasquez arrived in Los Angeles, she was still feeling (though perhaps not displaying), the effects of her in-flight drinking (Tr. 686-87). Customs Inspector McCulloch discerned nothing suspicious about Vasquez. He first asked her what she was bringing in from Canada (Tr. 243, 506-09). Vasquez replied she had only purchased a pair of shoes (Tr. 243).[10] McCulloch then asked, "Do you have any food, fruit, liquor, plants, seeds (acquired abroad)?" To which she replied, "No" (Tr. 244). Next, during the same series of questions, and in the context of reporting goods obtained in Canada, McCul-

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[7] Customs Inspector McCulloch testified that many foreign-born citizens speak English well but *read* and *write* it poorly (Tr. 239). Varela's mistakes are set forth at Tr. 236-39, 656-57. No handwriting comparison was made of Varela's and Vasquez' writing on the form (Tr. 371; J.A. 38).

[8] Compare *Von Neumann* v. *United States*, 660 F.2d 1319, 1322 n.8 (9th Cir. 1981).

[9] Vasquez subsequently signed an affidavit in support of her petition stating that she had read the form but did not believe she was required to report the currency (Tr. 657, 669-70).

[10] Inspector McCulloch, who was but a few feet away from claimant, did not detect the "bulkiness" subsequently claimed to have been seen on her person by Supervisor Cornish (Tr. 242).

loch asked her, "Do you have in your possession in excess of $5,000?" She said, "No" (Tr. 244).[11]

Sometime during the questioning, McCulloch inserted Vasquez' name into a law enforcement computer. It subsequently printed out that Vasquez was a "known heroin dealer" (Tr. 224, 225).[12] McCulloch informed his supervisor, Cornish, that Vasquez was "in the machine" (Tr. 246). After receiving this information, Supervisor Cornish stated for the first time that "she looked a l[illegible]le bulky," and told McCulloch to refer Vasquez to a matron for a body search (Tr. 246, 414). Meanwhile, McCulloch again asked Vasquez, "Is this all you brought from Canada?" She answered, "Yes, that's all I have, is (sic) my shoes" (Tr. 246-46).

Customs Inspector Mary Ann Courtney arrived to search claimant. She, like McCulloch, didn't s[illegible] any basis for searching Vasquez (Tr. 415, 574). Courtney testified 15 months later, that Vasquez appeared the same in court as she did when searched. Her "bulkiness" and size looked the same (Tr. 574-75). Only Cornish saw the elusive bulge. He never gave Vasquez an opportunity to explain the "bulge" before subjecting

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[11] McCulloch repeated the question and claimant answered it negatively a total of three times (Tr. 262, 491, 537; PB. 7; Pet.App. 15a-16a). Contrary to petitioner's brief (PB. 7), according to the testimony at the criminal trial, incorporated into the record of the civil forfeiture trial, Vasquez did not check the "No" box in answering question #10. See n. 7, *supra*. Varela checked the "No" box and Vasquez signed it without reading it.

Question #10 stated: "Are you or anyone in your party carrying over $5,000 in coin, currency, or monetary instruments?" (Tr. 657-58).

[12] The government makes much of this unverified computer information even though claimant's two convictions were reversed on appeal and dismissed. *United States* v. *Vasquez*, 597 F.2d 192 (9th Cir. 1979); *United States* v. *Vasquez*, 348 F. Supp. 532 (C.D. Cal. 1972); (PB. 9, 10-11 & ns. 10, 14).

her to a strip search (Tr. 553).[13] $8,850 located in an envelope in Vasquez' bra, was discovered and seized (PB. 16a).

None of the four Customs officers asked Vasquez: where she obtained the money, to explain why she had not declared it, or gave her a Form 4790 to report the currency as required by law (Tr. 509-11, 580). The IRS Form 4790 must be requested before Customs officers will provide it (Tr. 579). Other persons who had also mistakenly failed to declare property had been permitted to change or amend their declaration and file the necessary form (Tr. 584).[14]

After the seizure, Vasquez asked McCulloch if she had done anything wrong and if he thought she needed a lawyer (Tr. 511, 663). McCulloch said he didn't know, gave her a receipt and told Vasquez to contact the District Director of Customs (Tr. 511, 522). Vasquez also told McCulloch that she didn't think she had to report the money (Tr. 512). McCulloch never inquired why (Tr. 522). Vasquez was permitted to leave and was not arrested until nine months later after rejecting civil settlement of the case (J.A. 33; Tr. 123-24, 404).[15]

3. The very next day, Vasquez' attorney notified the District Director of the seizure and the reason she had not declared the money. (R. 35, 56).[16]

On September 18, 1975, Vasquez was incorrectly notified of her right to file a petition for remission or mitigation of forfeiture under 19 U.S.C. § 1618 (R. 57).[17]

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[13] Vasquez was cooperative during the search in which her blouse was removed and her long-line bra was opened (Tr. 576).

[14] See 19 C.F.R. § 148.16(a).

[15] Special Agent Janet Pompeo testified that if an agreement had been reached in the civil case, the outcome of the criminal case probably would have been different (Tr. 178).

[16] "R." refers to the Clerk's Record on Appeal.

[17] 31 U.S.C. § 1104 is the correct section. See *United States* v. *Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 202 (C.D. Cal. 1978).

One week later, Vasquez filed her petition (R. 58).[18] It stated that she had not knowingly violated the law because she mistakenly believed that she was only required to declare property obtained abroad (J.A. 81). During the ensuing months and years, Vasquez repeatedly requested that her petition be decided promptly and that reasons be given for any action taken on it (R. 60, 62, 65, 66).[19]

The Customs Service delayed assigning an agent to investigate the petition for over a month (September 10 - October 25, 1975) after the currency seizure (J.A. 43, Pet.App. 1[illegible]). Once assigned, Special Agent Pompeo interviewed the relevant Customs witnesses and collected the information necessary to indict Vasquez within a few days (J.A. 44-45, 77-78). On November 13, 1975, Pompeo contacted claimant's attorney to arrange an interview with her. Counsel declined to permit Vasquez to be interviewed out of his presence, and suggested that Pompeo come to Los Angeles for an earlier meeting (J.A. 44-45, 70-71).

On January 16, 1976, Vasquez' attorney again wrote the District Director requesting the status of the case and noting

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[18] The government repeatedly attempts to denigrate claimant for exercising her rights in the administrative process. Under the government's view, claimant's rights, once her property had been seized, became more ethereal than real (PB. 22). But when Vasquez' petition was filed, two opinions from the same district court had noted the benefits of the administrative process as an alternative to expensive civil litigation. *United States* v. *A Quantity of Gold Jewelry*, 379 F. Supp. 283 (C.D.Cal. 1974); *United States* v. *One 1971 Opel GT*, 360 F. Supp. 683, 640-42 (C.D.Cal. 1973).

[19] In *United States* v. *United States Coin and Currency*, 401 U.S. 715, 721 (1971), this Court stated in respect to the remission/mitigation function:

> "It is not to be presumed the Secretary will not conscientiously fulfill this trust and the *courts have intervened* when the innocent petitioner's protests have gone unheeded." See also *United States* v. *One 1972 Chevrolet Blazer, Etc.*, 563 F.2d 1386 (9th Cir. 1977).

that he had been told that a decision on the petition was to be made by January 22, 1976 (R. 60).

Despite counsel's offer to Pompeo, he was not contacted by her again until March 2, 1976 (J.A. 71). On March 5, 1976, Pompeo, who, unbeknownst to claimant and her attorney, was also conducting a criminal investigation of Vasquez, interviewed her under the guise of conducting an administrative investigation on the petition (J.A. 53, 59-61; Tr. 63-64, 147-49, 172-73). This interview on the petition was a sham. Pompeo had already made up her mind to refer the case to the U.S. Attorney for criminal prosecution (Tr. 205-07).

On March 29, 1976, Vasquez submitted the affidavit of John Walters in response to the request by Customs Officer Weeda at the taped interview on March 5, 1976 (R. 62-64; Tr. 81-82).[20] At the conclusion of the taped interview, Vasquez refused to settle the case (Tr. 89, 90, 123-124, 156).

On April 26, 1976, Vasquez' attorney again wrote the Customs Service requesting that the petition be granted or denied as soon as possible (R. 56, 58-59, 60, 62-64, 65).

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[20] Contrary to petitioner's claim (Pet. 9, PB. 9), that claimant's submission of the affidavit of John Walters (R. 62-64) "was the first 'innocent' explanation offered for Vasquez' possession of $8,850 while entering the United States . . .," no "explanation" is necessary. There is nothing illegal about transporting United States currency in or out of the country. 1970 U.S. Code Cong. & Admin. News. p. 4398. Further, her attorney's letter of September 11, 1975, and her petition for remission or mitigation of forfeiture, filed within one week of the seizure, also provided innocent explanations for her failure to declare the money (R. 56, 58-59). During the taped interview on March 5, 1976, Vasquez explained that she had given the diamond out of her wedding ring to John Walters as security for the money he gave her to purchase real estate in Canada (Tr. 80-81). Customs Agent June Moore, confirmed that on the day Vasquez re-entered the country, the diamond was missing from her ring (Tr. 588).

4. Concurrently with the preceding events, and based on the fact that Vasquez had been arrested for a narcotics violation four years earlier, Pompeo allegedly expanded her investigation to include several other law enforcement agencies (J.A. 46-48, 75-76). These agencies were unaware that the currency had even been seized from Vasquez (J.A. 71-72). No information connecting Vasquez with any "criminal enterprise" was ever provided to Pompeo as the result of the investigations allegedly conducted by these organizations (J.A. 51, 71-72). Pompeo had no idea whether any of these agencies investigated Vasquez during the first nine months she delayed taking any action on the petition (J.A. 73). Pompeo's alleged investigation produced no new facts or information that were not known to her at its inception (J.A. 69). This failure to uncover information implicating Vasquez in any criminal activity was omitted from the criminal case report submitted to the United States Attorney and Pompeo's report to the District Director regarding the administrative petition (J.A. 51-52).[21] The district judge found no corroboration that Pompeo had done any of the investigation she claimed to have accomplished as justification for the delay (J.A. 69).

Nine months after the seizure, without notice to claimant or her counsel, Vasquez was indicted for violating 18 U.S.C. § 1001 (knowingly and willfully making a false statement to a Customs officer—a felony), and 31 U.S.C. §§ 1058, 1101 (knowingly and willfully transporting $8,850 into the United States without filing a report—a misdemeanor) (Pet.App. 18a). Vasquez was never given an opportunity to testify before the Grand Jury or to present the affidavit of John Walters or other exculpatory evidence on her behalf. The Grand Jury proceedings were not transcribed (Tr. 168, 172-73, 191-92, 204-05, 261-17, 382, 387-88). Prior to testifying before the

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[21] See Br. in Opp. n.20; J.A. 47. See also, *Fines, Penalties & Forfeitures Handbook*, Department of the Treasury, United States Customs Service Office of Regulations and Rulings (HB 3000-01, March 1979 revision).

Grand Jury, Pompeo did not inform the Assistant United States Attorney in charge that there had been a settlement discussion (Tr. 204-05). Nor, apparently did Pompeo inform the Grand Jury about the John Walters affidavit or Vasquez' timely explanation for having the currency on her person and mistakenly failing to declare it (Tr. 191-92). Customs did not apprise the Assistant United States Attorney that a petition for remission had been filed within one week of the seizure of the funds (Tr. 361-62).

Customs took no action on claimant's administrative petition from mid-June 1976 through March 28, 1977, because Pompeo claimed to have an "informal understanding" that once a criminal case was filed, no further action should be taken on the petition until completion of the criminal trial (J.A. 84-85). The basis for this "understanding" was the mistaken view that the currency *might* be used as evidence (J.A. 84-85).[2]

5. The criminal trial began on December 14, 1976, and on December 24, 1976, the jury aquitted claimant of the misdemeanor charge of willfully failing to file the currency report, but convicted her of making a false statement (Pet.App. 17a). At the conclusion of the criminal trial, the court and jurors discussed the need for improving the ambiguous Customs Form (Tr. 940-41).

On December 28, 1976, Vasquez informed the Customs Service of the jury verdicts and once again renewed her request for expedition of the District Director's decision on her petition (R. 66). On March 10, 1977, the District Director notified Vasquez that the Service's forfeiture claim had been referred to the United States Attorney for "further action," thereby effectively blocking any administrative action on the

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[2] At the forfeiture trial, and at oral argument before the Ninth Circuit, the government was unable to offer any legal basis for this "understanding." The money was never introduced into evidence. The parties stipulated that Vasquez possessed $8,850 on September 10, 1975 (Tr. 483).

petition which still had not been decided (R. 67).[23] On March 22, 1977, a forfeiture complaint was filed. Finally, on March 28, 1977, Vasquez' petition was denied (R. 67). No reason was ever given for the denial. The government stipulated it did not know who denied the petition or why (R. 37, 68; J.A. 12, 24-25, 85).

In her claim and answer to the complaint, filed April 27, 1977, Vasquez admitted that she did not file the required report form and denied knowingly failing to report the currency (R. 4, 6-7, 58-59; J.A. 28, 37-39).

On August 18, 1977, Vasquez' motion for summary judgment was denied (R. 149-51).

At the civil forfeiture trial on January 17-18, 1978, claimant renewed the issues raised in her motion for summary judgment including the factual question whether she knew that she had to report currency not acquired in Canada when she returned to the United States on September 10, 1975 (J.A. 37-39). The government stipulated to Vasquez' testimony (J.A. 81). The district court declared the currency forfeited to the United States (J.A. 86).

6. On May 22, 1981, the Ninth Circuit reversed the district court. The majority ruled in accordance with the well-established law of the Ninth and other circuits that, "[u]nder the facts of this case the government failed to institute forfeiture proceedings in a timely manner and [that] such failure was not justified" (Pet.App. 4a).

SUMMARY OF ARGUMENT

I

The requirement of a *prompt* hearing has been part of the Anglo-American common law tradition since the Magna Carta. In the face of this tradition, petitioner's claim that there is no due process requirement for a prompt post-seizure judicial

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[23] 19 C.F.R. § 171.2(a).

hearing is contrary to reason and the decisions of virtually every court which has considered the issue. In forfeiture cases, once seizure is accomplished, all the justifications for postponing the hearing in the first place evaporate. The statutory and case law, Customs' own regulations and the Due Process Clause require the government to provide forfeiture claimants with the opportunity for a prompt post-seizure hearing.

A. Criminal prosecutions and civil forfeiture cases are fundamentally different. Society's interest in bringing the criminally accused to justice is different in kind and more important in degree than enforcing remedial civil statutes designed to raise revenue. Criminal defendants are provided numerous constitutional protections including proof beyond a reasonable doubt, a unanimous jury verdict and the Double Jeopardy Clause's bar to successive prosecutions. Although a forfeiture is frequently a more severe punishment than that meted out to one convicted of a crime, all of these and more constitutional protections are denied the forfeiture claimant. A motion to dismiss in a criminal case based on unjustified pre-indictment delay, is properly viewed as but one facet of the procedural due process guaranteed a defendant. The required element of prejudice in the criminal case is correctly assessed in conjunction with the broad range of procedural safeguards provided to protect his liberty or property interest. Legal rules and standards evolved in criminal cases should not be selectively applied in forfeiture cases solely to satisfy the government's convenience. The gist of the government's argument is that these remedial statutes are just criminal enough to apply the more severe criminal due process rules, but not sufficiently penal to require the procedural protections granted criminal defendants.

The government's claim that investigative similarities between *in rem* forfeitures and criminal cases require the adoption of criminal due process delay rules in forfeiture cases is mistaken and not supported by the record. Petitioner's own statistics establish that dual civil/criminal investigatios are the exception rather than the rule. Moreover, here, the govern-

ment's own witness admitted there was no investigation of the administrative petition, and claimaint's "interview" on the petition was a sham.

B. Currency forfeiture claimants possess a constitutionally significant property interest in their money. The ancient "relation back" doctrine does not apply to the statute under consideration here because it is a conditional, not a mandatory, forfeiture law. The Ninth Circuit's decision below was correctly based on the application of due process principles, developed in the context of *in rem* forfeiture cases, to this constitutionally protected interest.

The government's proffered substitutes for the judicial hearing it was statutorily compelled to provide are conceptually and practically inadequate. The government's recommended procedure would squander, not conserve, scarce judicial resources.

II

The record belies the government's claim that there was no unreasonable delay in this case because the 18 months between seizure and suit were consumed with processing Vasquez' administrative petition and conducting a criminal investigation.

A. The administrative process is generally not a substitute for the prompt judicial hearing required by statute and due process. The administrative procedure does not offer a real hearing, only a secret, one-sided determination of facts decisive of the claimant's rights. Fairness can rarely be obtained in such a setting. The facts here show that Vasquez' administrative interview was a subterfuge for collecting incriminating information and a mark on a bureaucratic check list. She was never given the reasons for the denial of her petition in violation of Customs' own regulations nor was she allowed to depose or examine the Customs officer whose name appeared on the denial. The administrative decision was secret and anonymous.

Due process requires that the hearing provided be subject to judicial review. Petitioner's arguments refute this requirement. More importantly, the remission process was never designed to determine the propriety of either the *seizure* or the *forfeiture*. Congress reserved these factual and legal questions for the judicial fact finding process. A negative administrative decision by Customs does not resolve these factual and legal issues. Absent an express waiver from the claimant, the mere submission of an administrative petition does not relieve the government of its legal obligation to promptly commence a judicial forfeiture action.

B. The circumstances of each case determine the reasonableness of any delay. The facts here clearly demonstrate that the delay was unreasonable as the Ninth Circuit properly found.

III

The deterrent value of the dismissal sanction is its own justification. Forfeiture of the government's right to forfeiture is a clear "bright line" rule easily understood by law enforcement officers. Dismissal of this civil lawsuit is particularly appropriate where government officers violated their own rules, the statutory and case law, and the Constitution they are sworn to uphold.

In the United States, the fictitious *in rem* forfeiture doctrine is entirely the creation of statute designed to raise revenue. Unusually trivial, *malum prohibitum* acts provide the government with extremely severe sanctions and windfall profits. The return of the seized *res* is a valid measure where Customs officers testified other citizens were given an opportunity to amend their Customs declarations after making the same error Vasquez did. Moreover, dismissal is a sanction routinely employed in civil cases for far less serious conduct than that performed here by the government. Despite an approximately 200 year long history, petitioner has cited no case, and claimant knows of none, where the government's proposed novel remedy has been applied to an *in rem* forfeiture. Indeed, the United

States actively sought the dismissal remedy against Vasquez as a sanction for her attorney's mistaken failure to attend a deposition. In those rare situations where the dismissal remedy is insufficient to compensate the aggrieved claimant for damages incurred during the property's unjustified retention, a *Bivens* suit for damages is appropriate and available.

ARGUMENT

I

THE GOVERNMENT MUST PROVIDE FORFEITURE CLAIMANTS THE OPPORTUNITY FOR A PROMPT POST-SEIZURE HEARING

1. Procedural due process imposes constraints on government decisions which deprive individuals of "property" interests within the meaning of the Due Process Clause of the Fifth Amendment. *Matthews* v. *Eldridge*, 424 U.S. 319, 333 (1976). Recently, this Court has considered the extent to which due process requires an evidentiary hearing *prior* to the deprivation of some type of property interest even if such a hearing is provided after the initial deprivation has occurred. *Id.*

> That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest (footnote omitted), except for some extraordinary situations where some valid government interest is at stake that justifies postponing the hearing until after the event.[24] *Bodie* v. *Connecticut*, 401 U.S. 371, 378-79 (1971) (original emphasis).

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[24] The constitutional protection of "property has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' *Bodie* v. *Connecticut*, 401 U.S. 379, 91 S.Ct. at 786, including statutory entitlement." *Fuentes* v. *Shevin*, 407 U.S. 67, 86 (1972).

Historically, postponement of the hearing until after the initial deprivation has been reserved for emergency situations, e.g., to meet the needs of a national war effort, to protect against economic disaster of a bank failure, and to protect the public from misbranded drugs and contaminated food. *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 91-92.[25]

The right to be heard does not, as the government argues and the dissenting judge's opinion implies (PB. 30-31, n.24; Pet.App. 12a), depend upon an advance showing that one will surely prevail at the hearing. "To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *Coe* v. *Armstrong Fertilizer Works*, 237 U.S. 413, 437 (1915). Indeed, "[i]t is enough to involve the procedural safeguards of the . . . (Due Process Clause) . . . that a significant property interest is at stake, whatever the ultimate outcome of a hearing . . . on the right to continued possession and use of the . . . (property)." *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 81.

2. In *Calero-Toledo* v. *Pearson Yacht Leasing*, 416 U.S. 663 (1974), this Court upheld a Puerto Rican forfeiture law that lacked pre-seizure notice and hearing requirements. The law was modeled on a mandatory federal forfeiture statute (21 U.S.C. § 881[a]). The *Pearson* post-seizure hearing rule was based on three factors: (1) seizure served important governmental purposes (assertion of *in rem* jurisdiction, prevents the property's continued illicit use); (2) pre-seizure notice and hearing might frustrate the statutory purpose (the yacht's inherent mobility permitted it to be removed, destroyed or concealed); (3) the seizure determination was made by government officials, not self-motivated private parties. *Id.* 679-80.

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[25] But see *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Arnett* v. *Kennedy*, 416 U.S. at 171 (1974) (Opinion of White, J.).

The yacht in *Pearson* had been used as a container to transport marijuana. The seizure took place two months after the alleged criminal conduct. This time period was presumably long enough for officials to verify the factual basis for the seizure. There was no mention of official misconduct, and, unlike prior decisions by this Court, the neutrality of the seizing law enforcement agents was unquestioned. See *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693 (1965) (exlusionary rule applies in forfeiture cases to deter unlawful seizures by government officials); *Johnson* v. *United States*, 333 U.S. 10, 13-14, n.3 (1948) (law enforcement bias and zeal in Fourth Amendment context require a neutral and detached magistrate to make probable cause determination); accord *Stypmann* v. *City and County of San Francisco*, 557 F.2d 1335, 1343 (9th Cir. 1977) (seizing police officers' judgment that parking violation had occurred not "wholly neutral"); *Lee* v. *Thornton*, 538 F.2d 27, 33 (2d Cir. 1976).[26]

Although the longer the period between the seizure and the hearing, the more devastating will be the loss (*Arnett* v. *Kennedy*, *supra*, 416 U.S. at 219 [Marshall, J., dissenting]), in *Pearson*, this Court did not discuss how promptly the post-seizure hearing must be convened. See *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 19 (1978).

In this argument, claimant assumes the application of the *Pearson* post-seizure hearing rule. She contends that important factual and legal differences between her case and *Pearson* demonstrate and clarify the right to a prompt post-seizure hearing. These differences include: the kind of property to be forfeited, the nature of the forfeiture statutes under considera-

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[26] In many *in rem* forfeiture cases, e.g., under 21 U.S.C. § 881(a), law enforcement agents actively engaged in the "often competitive business of ferreting out crime" (*Johnson* v. *United States*, *supra*), perform a search and seize the defendant property. Claimant submits that law enforcement officials may be both more zealous and biased in seizing property than the private parties discussed in *Fuentes* and *Pearson*.

tion and both pre-seizure and post-seizure factual and procedural circumstances.

The requirement of a prompt hearing has been part of the Anglo-American common law tradition since the Magna Carta. *United States* v. *Lovasco*, 431 U.S. 783, 799-800 (1977) (Stevens, J., dissenting). In the face of this tradition, petitioner contends, *inter alia*, that there is no due process requirement for a prompt post-seizure judicial hearing. The government's extraordinary position is contrary to reason and the decisions of virtually every court which has considered the issue. See, e.g., *Von Neumann* v. *United States*, *supra*, 660 F.2d at 1324 (9th Cir. 1981); *Seguin* v. *Eide*, 645 F.2d 804, 808-09 (9th Cir. 1981); *Stypmann* v. *City and County of San Francisco*, *supra*; *Ivers* v. *United States*, 581 F.2d 1362, 1372 (9th Cir. 1978); *United States* v. *One 1970 Ford Pickup*, 564 F.2d 864, 866 (9th Cir. 1977); *Lee* v. *Thornton*, *supra*; *Pollgreen* v. *Morris*, 496 F. Supp. 1042, 1051-53 (S.D. Fla. 1980); *United States* v. *Eight (8) Rhodesian Stone Statues*, 449 F. Supp. 193, 202 (C.D.Cal. 1978); *Boston* v. *Stephens*, 395 F. Supp. 1000 (S.D.Ohio 1975); *United States* v. *A Quantity Of Gold Jewelry*, *supra*, 379 F. Supp. 293, 287 (C.D.Cal. 1974).

The forfeiture statute in *Pearson* was mandatory, not permissive as 31 U.S.C. § 1102 has been held to be. *United States* v. *United States Currency Totalling $48,318.08*, 609 F.2d 210, 212-13 (5th Cir. 1980); see *Calero-Toledo* v. *Pearson Yacht Leasing*, *supra*, 416 U.S. at 665 n.1, 686 n.25; see discussion *infra* at pp. 23-25. The difference—between the kinds of *in rem* forfeiture statutes under consideration here and in *Pearson*—directly affects claimant's interest in the property and the speed with which the post-seizure hearing must be convened. Because Vasquez' property interest remained significant pending adjudication of the propriety of the *seizure* and *forfeiture* under 31 U.S.C. § 1102, a prompt post-seizure hearing was required.

Here, the property, United States currency, was unconnected to any illicit purpose or criminal activity, and was "neither prohibited nor considered . . . subject to duty or tax."

Fines, Penalties & Forfeitures, supra, at p. 84; 1970 U.S. Code Cong. & Admin.News, p. 4398. Thus, the first factor in *Pearson* (preventing continued illicit use of the property) is not present in this case.

The seizure and search of Vasquez' person and seizure of the currency are also dissimilar to those conducted in *Pearson*. The initial decision to search Vasquez was based on unverified computer information (Tr. 224, 245-46, 414-15, 574-75). Without this computer data, it is unlikely there would have been either a search of Vasquez' person or a seizure of the currency. The "not insubstantial" risk of erroneous deprivations based on computer error has concerned both this Court and Congress. *Memphis Light, Gas & Water Division* v. *Craft, supra*, 436 U.S. at 18 & n.20. The possibility that other citizens, themselves confused by ambiguous Customs reporting forms, may be subjected to unlawful searches and seizures based on unverified and potentially erroneous computer data, is but one reason that a prompt post-seizure hearing is required. Further, the reduced factual showing required in the border search context where Title 31 currency reporting requirements are enforced, increases the likelihood of erroneous searches and seizures by well-intentioned yet biased law enforcement officials.

Only the second factor relied on by this Court in *Pearson*—the possibility that the property will be removed or concealed—remains. While this factor alone may justify the *Pearson* post-seizure rule, once seizure is accomplished, the other justifications for postponing the hearing enumerated in *Pearson* evaporate. *Wiren* v. *Eide*, 542 F.2d 757, 761 n.6 (9th Cir. 1976).

Petitioner argues that the already postponed hearing may be delayed still further at the government's convenience as long as the hearing is provided within the five year statute of limitations (PB. 19). This unprecedented attempt to extend *Pearson* beyond its own facts and the particular statute under consideration there disregards prior decisions of this Court

and the law as it now stands in at least six circuits.[27] Further, the government advocates that this Court overrule outright numerous district court opinions in the Sixth, Ninth and Eleventh Circuit.[28] Petitioner bases its extraordinary request for a sweeping change in the law on its peculiar interpretations of Customs' own regulations, the statutory and case law and the Due Process Clause.

A. Statutory And Case Law, Customs' Regulations And The Due Process Clause Require A Prompt Post-Seizure Judicial Hearing.

1. The passage of 18 months between the seizure and commencement of judicial forfeiture proceedings in this case violated 19 U.S.C. § 1603, as judicially construed before and after the seizure, as well as Customs' own regulations and claimant's minimum due process right to a prompt post-seizure judicial hearing. *Von Neumann* v. *United States, supra; State*

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[27] *United States* v. *Thirty-Seven (37) Photographs*, 402 U.S. 363, 368 (1971); *Von Neumann* v. *United States, supra; Seguin* v. *Eide, supra; United States* v. *Thirty-Six Thousand One Hundred & Twenty-Five Dollars ($36,125.00) In United States Currency*, 642 F.2d 1211 (5th Cir. 1981), aff'g 510 F. Supp. 303 (E.D.La. 1980); *White* v. *Acree*, 594 F.2d 1385 (10th Cir. 1979); *Ivers* v. *United States, supra*, 581 F.2d 1362 (9th Cir. 1978); *United States* v. *DiRodio*, 565 F.2d 573 (9th Cir. 1977); *United States* v. *One 1970 Ford Pickup, supra; Lee* v. *Thornton, supra; United States* v. *One Motor Yacht Named Mercury*, 527 F.2d 1112, 1114 (1st Cir. 1975); *State Marine Lines, Inc.* v. *Schultz*, 498 F.2d 1146, 1154-55 (4th Cir. 1974); *Sarkisian* v. *United States*, 472 F.2d 468, 471 (10th Cir. 1973), *cert. denied*, 414 U.S. 976 (1973). Compare *United States* v. *One 1971 BMW 4-Door Sedan*, 652 F.2d 817, 819-20 (9th Cir. 1981).

[28] *United States* v. *Eight (8) Rhodesian Stone Statues, supra; United States* v. *One (1) Douglas A-26 B Aircraft*, 436 F. Supp. 1292, 1299 (S.D.Ga. 1977); *Boston* v. *Stephens, supra; United States* v. *A Quantity of Gold Jewelry, supra; United States* v. *One 1971 Opel GT, supra*. See *May* v. *United States*, 515 F. Supp. 600, 611-12 (S.D. Ohio 1981).

Marine Lines, Inc. v. *Shultz*, *supra*, 498 F.2d at 1154-55; *Fines, Penalties & Forfeitures Handbook*, *supra*, pp. 21-22, 26, 119.[29]

Indeed, "expedited proceedings by the seizing agent (19 U.S.C § 1602) and the United States Attorney (19 U.S.C § 1604) can mean little if there is a delay of any consequence." *Sarkisian* v. *United States*, *supra*, 472 F.2d at 471.[30] "From the standpoint of the claimant, the stage in the proceeding in which the excessive delay occurs is irrelevant. His concern, and the express constitutional mandate, is the quick and efficient determination of his interest in the confiscated property." *United States* v. *One 1970 Ford Pickup*, *supra*, 564 F.2d at 866. "There could be little doubt before . . . the 1978 . . . Amendment, however, that . . . (the promptitude requirement) . . . was the appropriate standard. . . ." *Seguin* v. *Eide*, *supra*, 645 F.2d at 805. The government's claim to the contrary based on the 1978 Amendment to 19 U.S.C. § 1603 is incorrect and misleading. The statutory history of the Tariff Act establishes that the original promptitude requirement was deleted

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[29] The Ninth Circuit has found it unnecessary to decide whether the judicial referral statutes (19 U.S.C. §§ 1602-1604) apply to seizures under 31 U.S.C. § 1102. *Ivers* v. *United States*, *supra*, 581 F.2d at 1370. The court held that Customs' obligation to act expeditiously in referring the seizure to the United States Attorney for commencement of legal proceedings "flows independently from the Constitution." The Fifth Circuit adopted this ruling in *United States* v. *Thirty-Six Thousand One Hundred & Twenty-Five Dollars ($36,125.00) In United States Currency*, *supra*. The Ninth as well as the Fourth and Tenth Circuits had read the promptitude requirement back into § 1603 prior to the 1978 Amendment. *United States* v. *One 1970 Ford Pickup*, *supra*, 564 F.2d at 866; *State Marine Lines, Inc.* v. *Shultz*, *supra*, 498 F.2d at 1155; *Sarkisian* v. *United States*, *supra*, 472 F.2d at 472.

[30] Expedited proceedings are required by Customs' own regulations. *Fines, Penalties, & Forfeitures Handbook*, supra, at 21-22, 25-26, 119.

in 1938 at least in part because of the abolishment of a particular office in the Department of the Treasury.[31] More importantly, however, the Fourth and Tenth Circuits, and two published district court decisions in the same district in California in which Vasquez' currency was seized, had read the promptitude requirement back into the statute and dismissed forfeiture actions brought by the same Customs Service office before this seizure took place.[32] Further, "[t]he absence of statutory language does not eliminate the constitutional requirement of due process. . . ." *Von Neumann* v. *United States, supra,* 660 F.2d at 1324.

A prompt report under Customs' regulations, 19 U.S.C. § 1603, the case law and the Due Process Clause is required whenever legal proceedings are necessary. The government argues that due to a pending administrative petition and an alleged criminal investigation in this case, it was unclear that such a report would be required under § 1603 (PB. 19). The facts and the law are contrary.

Agent Pompeo allegedly conducted a dual investigation of the administrative petition and the criminal case. She had interviewed all the relevant witnesses and acquired sufficient information to indict Vasquez within a few days after receipt of the file in October 1975. She opened a criminal file in early November, well before the 60-day period for filing the petition for remission had elapsed. Both agents Pompeo and Weeda testified they refer *all* currency and seizure cases to the United States Attorney (Tr. 138-39, 205-07). The facts unequivocally demonstrate that Customs knew more than 16 months before the denial of claimant's petition that legal proceedings, at least

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[31] See Section 24 of the Bill's analysis, H.R. Rep. No. 1429, 75th Cong. 1st Sess. 5, (1939).

[32] *State Marine Lines, Inc.* v. *Shultz, supra; Sarkisian* v. *United States, supra; United States* v. *A Quantity Of Gold Jewelry, supra; United States* v. *One 1971 Opel GT, supra.* Customs' *Fines, Penalties & Forfeitures Handbook* cites *Sarkisian* v. *United States* for the proposition that it is required to act promptly. *Id.* at 19.

in the form of criminal prosecution, were intended. Moreover, the law confirms that legal proceedings are required whenever the government intends to seek forfeiture under 31 U.S.C. § 1102.

§ 1102 is nominally a civil *in rem* and not a criminal *in personam* forfeiture statute. Compare 18 U.S.C. § 1963 and 21 U.S.C. § 848. See U.S. Const. Art. III, § 3; 18 U.S.C. § 3563. There was no prospect that forfeiture could be decreed in Vasquez' criminal case as contended by the government as an excuse for its unreasonable delay (PB. 25).[33]

Further, as the government notes, an acquittal in the criminal case under the Reporting Act Statute (31 U.S.C. § 1058) would not bar forfeiture of the money because of the differences in the statutory elements and burdens of proof. *One Lot of Emerald Cut Stones And One Diamond Ring* v. *United States*, 409 U.S. 232, 234-36 (1972).[34] An *in rem* forfeiture action was necessary to forfeit the currency, and Customs knew it over a year before appropriate action was taken (Tr. 206-07).

One reason for the promptitude requirement is to avoid the inevitable personal prejudice and hardship resulting from governmental delay whatever the outcome of the case at the forfeiture trial. The district court recognized this factor and stated:

> There is a considerable amount of money that belongs to a person who can be seriously jeopardized by being deprived of it for a period of 9 months. And the fact she does

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[33] *United States* v. *United States Currency Totalling $48,318.08*, *supra*, 609 F.2d 212-13. But see *Ivers* v. *United States*, *supra*, 581 F.2d at 1366-67; *United States* v. *Thirty-Six Thousand One Hundred & Twenty-Five Dollars ($36,125.00) In United States Currency*, *supra*, 510 F. Supp. at 307.

[34] But see note 3 of the Court's opinion in *One Lot Of Emerald Cut Stones*, *supra*, where it declined to decide if an acquittal under 18 U.S.C. § 545 barred a forfeiture under § 545.

not know for that period of time is jeopardizing even though she may eventually lose it (J.A. 21). See *Coe* v. *Armstrong Fertilizer*, *supra*, 237 U.S. at 437.

2. The government correctly identifies three stages in the forfeiture process: (1) seizure, (2) retention until release or forfeiture, (3) judgment, and observes that the second stage is in controversy here (PB. 20). However, the government's analysis of the Ninth Circuit's decision in this case, and the due process requirements for *in rem* forfeiture statutes rests on several erroneous assumptions about the forfeiture statutes in general and 31 U.S.C. § 1102 in particular.

Petitioner attempts to denigrate Vasquez' and all forfeiture claimants' interest in their property seized for forfeiture, contending that it is more theoretical than real (PB. 22, n.17, 30, n.24). The purpose of this attack is to minimize both the form and speed required by due process for the post-seizure hearing.

Relying on *United States* v. *Stowell*, 133 U.S. 1, 16-17 (1890), the government assumes the application of the "relation back" doctrine to this case.[35] From this premise, it reasons that since under *Stowell*, the forfeiture takes place at the moment of the commission of the unlawful act, claimant has no "significant" property interest worthy of a prompt post-seizure judicial hearing under the Due Process Clause (PB. 20). This argument has no more support in reason than it does in case law. See *Bodie* v. *Connecticut*, *supra*, 401 U.S. at 378-39. The government contends no "significant" property rights remain, due to the "relation back" fiction, and concludes that the entire civil forfeiture trial is a meaningless statutorily compelled formality to quiet title in property it already owns (PB. 20, 22, 23).[36]

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[35] We cited *Stowell* (Br. in Opp. 13, n. 25) as an illustration of the general harshness of many forfeiture statutes.

[36] "It seems to be a rule founded in common sense, as well as strict justice, that fictions of law shall not be permitted to work any wrong . . . and in respect to the doctrine of relation, this rule has been

This mistaken analysis oversimplifies the history, variety and scope of the forfeiture laws, the intent of Congress in enacting 31 U.S.C. § 1102 and Customs' own regulations in enforcing it.[37] In forfeitures at common law, nothing vested in the government until it asserted legal rights, "after which, for many purposes, the doctrine of relation back . . . (carried) . . . back the title to the commencement of the offense. . . ." *United States* v. *Grundy and Thornburgh*, 3 Cranch 336, 350 (1806) (Marshall, C.J.). However, "[*w*]*here a forfeiture is given by a statute*, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, *or on the performance of some particular act*, as it shall be the will of the legislature." *Id.* (Emphasis added).

Today, there are two broad types of *in rem* forfeiture statutes: those that are mandatory, title vesting in the government when the forfeiting act occurs, *United States* v. *Stowell*, *supra;* and others that are conditional or permissive, forfeiture occurring only if and when the government follows certain definite prescribed procedures. *One 1958 Plymouth Sedan* v. *Pennsylvania*, *supra*, 380 U.S. at 699.

31 U.S.C. § 1102 is a conditional or permissive forfeiture statute. *United States* v. *U.S. Currency Totalling $48,318.08*, *supra*, 609 F.2d at 212-13. Only that currency transported in violation of the § 1102 reporting requirement is "subject to seizure and forfeiture to the United States." 31 U.S.C. § 1102(a). "The doctrine of relation back as announced in

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admitted in its fullest extent in civil cases . . . . For it has been repeatedly adjudged that relation shall never work an injury . . . ." *United States* v. *160 Bags Of Coffee*, 8 Cranch 398, 415 (1814) (Story, J., dissenting). Forfeitures were intended to be applied only to those who are significantly involved in a criminal enterprise. *United States* v. *United States Coin and Currency*, *supra*, 401 U.S. at 721-22.

[37] See *Calero-Toledo* v. *Pearson Yacht Leasing*, *supra*, 416 U.S. at 694 (Douglas, J., dissenting in part); *Fines, Penalties & Forfeitures Handbook*, *supra*, at App. AA pp. 1-3.

Stowell does not apply where the statute provides only for a *possibility* of subsequent forfeiture." *Id.* (Emphasis added.) "[I]n *Stowell* . . . the statute . . . was mandatory, requiring that upon the occurrence of specific acts certain property '*shall* be forfeited to the United States.' (Citation.)" *Id.* (Emphasis added.) See *United States* v. *Eight (8) Rhodesian Stone Statues*, *supra*, 449 F. Supp. at 206. Compare 26 U.S.C. §§ 7301, 7302 and 21 U.S.C. § 881(a) with 31 U.S.C. § 1102(a).

The court's reasoning in *Currency Totalling $48,318.08*, *supra*, is firmly supported by the statutory history of § 1102 which provides that the duty and burden of going forward and instituting forfeiture proceedings rests with the government. Once forfeiture proceedings have been instituted, the government retains the burden of proving by a preponderance of the evidence that the property should be forfeited. H.R.Rep.No. 91-975, 91st Cong. 2d Sess. Pub.L. 91-508, 1970 U.S. Code Cong. & Admin. News, p. 4394, 4404.[38]

The relation back doctrine does not apply to this case. The Ninth Circuit's decision below is correctly based on the application of due process principles evolved in the context of *in rem* forfeiture cases to claimant's constitutionally protected property interest. This interest is and was entitled to the full protection of the Due Process Clause, which includes a prompt post-seizure judicial hearing (to litigate in a statutorily required adversary setting the substantial questions of fact and law presented by her case). Neither the pendency of an administrative petition nor an alleged criminal investigation justified the government's unreasonable delay in providing Vasquez a hearing on the merits of their claim. *Ivers* v. *United States*, *supra*, 581 F.2d at 1368, 1371. See *United States* v. *Eight (8) Rhodesian Stone Statues*, *supra*, 449 F. Supp. at 199-207.

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[38] Petitioner's assumption that 19 U.S.C. § 1693 requires a shifting of the burden of proof once the government has made out a *prima facie* case is at variance with the statutory history.

3. In attacking the Ninth Circuit's judgment petitioner focuses on the issue of prejudice, arguing that procedural due process rules evolved in criminal cases should be applied to *in rem* forfeiture actions (PB. 21-28). In view of the sometimes punitive purposes of these forfeiture statutes (see, e.g., *Boyd* v. *United States*, 116 U.S. 616, 634 [1886]; *One 1958 Plymouth Sedan* v. *Pennsylvania*, *supra*) and claimed investigative similarities, petitioner concludes that either the rule in *United States* v. *Lovasco*, *supra*, 431 U.S. 783, 790 (1977) or *Barker* v. *Wingo*, 407 U.S. 514 (1972), is dispositive here (PB. 21-30). As discussed below, neither this Court's due process analysis in *Lovasco* nor its speedy trial test in *Barker* v. *Wingo* controls this case. Differences in statutory purpose, public policy and due process analysis compel this conclusion.

Petitioner's argument, based on *Boyd* and *One 1958 Plymouth Sedan*, assumes that the purpose of all *in rem* forfeiture statutes is punitive or penal (PB. 21, 25). Actually, this Court has held that the civil or criminal purpose of a statute is a question of statutory construction. *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938). Compare *United States ex rel Marcus* v. *Hess*, 317 U.S. 537, 553-54 (1943) (Frankfurter, J., dissenting). In *One Lot of Emerald Cut Stones And One Ring* v. *United States*, *supra*, this Court held that *in rem* forfeitures under 19 U.S.C. § 1497 were *civil and remedial* and not criminal and punitive in purpose. This analysis comports with the history of other revenue laws. The Court in a *per curiam* opinion distinguished *Boyd* and *One 1958 Plymouth*, and wrote:

> Section 1497 does not result in a forfeiture by reason of the commission of a criminal offense. Forfeiture results from the act of importation without following customs procedures; no criminal offense, much less a criminal conviction, is required. Cf. *id.*, at 718-22, 91 S.Ct. at 1043, 1045.
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> *One 1958 Plymouth Sedan* v. *Comm. of Pennsylvania*, (citation), is likewise inapposite for it dealt with a forfeiture that could not be had without a 'determination that the criminal law has been violated.' *Id.* at 701, 85 S.Ct. at 1251. *One Lot Emerald Cut Stones And One Ring* v. *United States*, *supra*, 409 U.S. at 236, n.6.

The criminal sanctions of 31 U.S.C. §§ 1058 and 1059 are separate from the forfeiture and civil penalty provisions. 31 U.S.C. § 1102 is predominantly civil and remedial. The criminal rules are inapplicable.

The government urges the defendant's liberty is in jeopardy in a criminal case whereas the forfeiture claimant only has at best a mere property interest at stake. However, a criminal conviction may only result in a small fine or a minimum restriction on liberty in the form of unsupervised probation. *One 1958 Plymouth Sedan* v. *Pennsylvania*, *supra*, 380 U.S. at 700-02 (maximum penalty for violation of criminal statute $500 fine, value of automobile to be forfeited $1000).

In contrast, though nominally "civil," an *in rem* judgment of forfeiture against the "defendant" currency is an absolute sanction. This civil penalty is frequently harsher than the criminal sentence. It may result in prolonged anxiety, a feeling of being unjustly treated by the government and ultimately, as here, in personal financial disaster.[39]

Petitioner reasons that under *Lovasco's* due process analysis, the defendant is required to show, *inter alia*, actual prejudice to his defense at trial in order to obtain dismissal of the charge against him. Drawing upon the alleged penal purposes and claimed investigative similarities between the criminal law and *in rem* forfeiture statutes in general, the government concludes the Due Process Clause required Vasquez to prove the element of actual prejudice or at least invidious governmental motivation to obtain relief. This argument is not new. It has previously been advanced by the government and rejected by this Court. See *Helvering* v. *Mitchell*, *supra*, 303 U.S. at 400 (*in rem* forfeitures are not essentially criminal and subject to the rules governing criminal prosecutions); *United States* v. *Eight (8) Rhodesian Stone Statues*, *supra*, 449 F. Supp. at 206-07.

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[39] Vasquez was granted *in forma pauperis* status in both her criminal and forfeiture cases in the court of appeals and by this Court.

Petitioner's argument shifts the focus from the individual's interest to the government's interest when this comparison favors the adoption of criminal law precedent in forfeiture actions. The perspective is shifted back to the individual's interest when that view supports the government's conclusion. Specifically, petitioner claims that dismissal without a showing of trial prejudice is too severe a sanction for unjustified delay in beginning a forfeiture trial.[40] The government emphasizes that in a criminal trial where liberty, not property interests, is involved, the defendant must show actual prejudice to obtain a dismissal. Since in our society liberty is more important than property, petitioner claims the criminal rules should apply in civil forfeiture trials. This reasoning may sound syllogistically valid, but it is factually and legally incorrect. The government disregards at least two major factors.

First, the government's interest as the representative of society in the criminal trial is clearly different and more important than in the forfeiture case. The government's own statistics support this conclusion. 90% of the seizures under the Customs laws are apparently resolved without referring the cases to the United States Attorney for institution of civil or criminal proceedings (PB. 7). Second, the procedural due process guaranteed the criminally accused includes numerous sepa-

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[40] The government's argument that the Ninth Circuit rule requires only a prompt *filing* of a civil forfeiture complaint misstates that court's ruling and ignores its purpose. Obviously, it is impossible under the statutory scheme enacted by Congress to provide a prompt post-seizure judicial hearing without filing the *in rem* forfeiture complaint.

In certain limited cases, the government and the individual may agree to stay or continue the forfeiture trial. A claimant may waive his right to a prompt referral of the government's claim to the United States Attorney for institution of judicial forfeiture proceedings, or to a prompt hearing after the complaint has been filed (Br. in Opp. 15-16). The Ninth Circuit's rule only prohibits the government from *unilaterally* delaying the judicial hearing as it did here. *Ivers* v. *United States*, *supra*, 581 F.2d at 1371-72.

rate procedural safeguards at each stage of the process. See *United States* v. *Ewell*, 383 U.S. 116, 120 (1966). None of the following safeguards is afforded the forfeiture claimant:

1. Independent Grand Jury determination of probable cause prior to arrest;

2. Reasonable bail including own recognizance release;

3. If indigent, right to counsel at public expense;

4. If incarceration is possible, a speedy and public jury trial;

5. Confrontation of witnesses at all stages of the proceedings;

6. Burden of proof beyond a reasonable doubt which remains with the government throughout the trial;

7. Fifth Amendment privileges not to be called as a witness and not to testify against oneself which, when exercised, cannot be commented on by the prosecution;

8. Rules of evidence, including the hearsay rule;

9. Right to a unanimous jury verdict;

10. Fifth Amendment's Double Jeopardy Clause;

11. Rule of *Simmons* v. *United States*, 390 U.S. 377 (1968);

12. Free compulsory process of the court.

In the forfeiture trial, in addition to being afforded fewer peremptory challenges, forfeiture claimants are also subject to a directed verdict and the government can appeal if it loses.

Because society's interest in bringing the criminally accused to justice is, by definition, both different in kind and greater in degree than in forfeiting innocent non-contraband property, it is not unreasonable that a criminal defendant, already provided numerous other procedural safeguards to insure the fairness and quality of his hearing, should have to demonstrate actual prejudice in order to obtain dismissal of the charge. The defendant's motions to dismiss for unjustified pre-indictment delay or for denial of a speedy trial are properly viewed as but one facet of the entire procedural due process granted criminal

defendants. The required element of prejudice in the criminal context is correctly weighed in conjunction with the full range of procedural safeguards provided to protect his liberty or property interests.

The *in rem* forfeiture claimant's overall procedural setting is substantially inferior. First, his property has been summarily seized by government agents, themselves engaged in the competetive business of ferreting out crime, without benefit of a neutral or detached magistrate. *Johnson* v. *United States*, *supra*, 333 U.S. at 13-14, n.3. Next, it is held without bail while it depreciates in value. *United States* v. *One 1970 Ford Pickup*, *supra*, 564 F.2d at 866. Under current Treasury Department policy, the government refuses to place the money in an interest-bearing account relying on: 31 U.S.C.§§ 484, 495, 496, 521. The property is presumed guilty, and the burden of proof is on the forfeiture claimant. *United States* v. *One 1975 Mercedes 280 S*, 590 F.2d 196, 199 (6th Cir. 1975). A unanimous jury verdict is not required to convict the defendant property. Cf. *Johnson* v. *Louisiana*, 406 U.S. 356 (1972). To this drastically inferior procedural model, the government argues that the more demanding criminal due process delay rule should be added. Petitioner argues for a rule of governmental convenience and ignores the very real issues of personal and economic hardship created by its unjustified delay in this case. *United States* v. *One 1970 Ford Pickup*, *supra*, 564 F.2d at 866.[41] See *United States* v. *Eight (8) Rhodesian Stone Statues*, *supra*, 449 F.Supp. at 205.

The Ninth Circuit correctly held that Customs' so-called investigation did not excuse its failure to provide Vasquez the opportunity for a prompt post-seizure hearing. *Von Neumann* v. *United States*, *supra*, 660 F.2d at 1329; *Seguin* v. *Eide*,

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[41] The government dismisses the significance of the property's depreciating or "wasting" character (PB. 27 at n.21). This view is based on its misplaced reliance on *United States* v. *Stowell*, *supra*, and its backward or retrospective analysis of the forfeiture process.

supra, 645 F.2d at 808-09; *Pollgreen* v. *Morris*, *supra*, 496 F.Supp. at 1061-63. See *Stypmann* v. *City and County of San Francisco*, *supra*, 557 F.2d at 1344; *Lee* v. *Thornton*, *supra*, 538 F.2d at 33. Moreover, while the Ninth Circuit's rule is that filing of an administrative petition for remission or mitigation of forfeiture alone will not justify Customs' failure to promptly refer the matter to the United States Attorney for forfeiture proceedings, no different result would have occurred on these facts under the Tenth Circuit's rule. *White* v. *Acree*, *supra*, 594 F.2d at 1390. Here, the duration of the government's so-called investigation was unreasonable, and claimant's counsel repeatedly requested prompt action on her petition.

Indeed, during seven of the first nine months of bureaucratic footdragging, nothing was done by anyone to investigate Vasquez (R. 108-09). It is uncontradicted that no investigation was done during the second nine-month period (J.A. 84-85). This completely unjustified 16-month delay belies the government's claim that it "actively investigated" Vasquez during "most" of the 18 months between seizure and filing a forfeiture suit (PB. 27, 46). The record is similarly devoid of any basis for the government's conclusion that her petition was "reconsidered" (PB. 29).

The Ninth Circuit's judgment is not in conflict with *United States* v. *Lovasco*. Numerous policy considerations expressed by this Court in *Lovasco* further illustrate the distinctions between criminal defendants and forfeiture claimants. Petitioner contends the Ninth Circuit's view violates *Lovasco* because it would force the prosecution to file charges promptly, even if its investigation of the entire criminal transaction is not complete (PB. 23). This is inaccurate.

First, this argument assumes incorrectly that a criminal investigation is the rule rather than the exception in forfeiture cases. The government's own statistics clearly show that court action is the exception (PB. 7).

In *Lovasco*, this Court observed that it would be unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause or before he is satisfied he will be able

to establish proof beyond a reasonable doubt. Yet, as petitioner is well aware, proof beyond a reasonable doubt is not applicable to civil forfeiture cases. *United States* v. *Regan*, 232 U.S. 37, 50 (1914); *Bramble* v. *Richardson*, 498 F.2d 968 (10th Cir. 1974) *cert. denied*, 419 U.S. 1069 (1974). According to the government's own brief, the burden of proof at a forfeiture trial is shifted to the claimant after a mere showing of probable cause (19 U.S.C. § 1615), the same quantum of proof necessary to indict in a criminal case. This substantial difference in the burden and quantum of proof between *in rem* forfeitures and *in personam* criminal cases distinguishes the prosecutor's role in *Lovasco*.

The government makes much of the need for a careful investigation in forfeiture cases. We submit that the claimed need is more imaginary than real, and that the government's own arguments refute this claim. For if, as the government urges, 31 U.S.C. § 1102 is a strict liability statute, there is nothing left to investigate once probable cause for the seizure has been determined. Petitioner argues at some length that there were no facts to try at the forfeiture trial because the only requirement is a *prima facie* showing of failure to declare the currency regardless of *knowledge*, *mistake* or *accident*. By this reasoning, the only facts conceivably subject to investigation were the circumstances surrounding Vasquez' re-entry into the United States. This information, according to the government's own witnesses, was assembled within a few days after the case agent received the file (J.A. 44-45, 77-78). If further *criminal* investigation was necessary, it had no bearing on whether or not the IRS 4790 form was filled out. There was no justification to delay the opportunity for a prompt hearing. If knowledge and intent are absolutely irrelevant to the forfeiture action, proceedings should have been instituted promptly, and the criminal investigation pursued independently. See discussion *infra* at pp. 35-37. Compare *United States* v. *Granda*, 565 F.2d 922 (5th Cir. 1978). See *Von Neumann* v. *United States*, *supra*, 660 F.2d at 1322-23.

Other reasons for the delay advanced by petitioner are similarly devoid of merit. Retention of the currency as physical evidence for introduction at trial as proof of a criminal currency violation was transparently unnecessary if not contrived after the fact. Testimony by one of the four Customs agents would have sufficed to prove that Vasquez possessed the currency and didn't fill out the required report form.

4. Petitioner also complains that affording claimant the opportunity for a prompt post-seizure judicial hearing, a practice concededly adopted and implemented by its own client agency since 1979, is unreasonable, not required by due process and generally a bad practice for everyone (PB. 23). The position is misconceived.

The court of appeals' decision below was expressly grounded on the facts and peculiar circumstances presented here (Pet. App. 4a). See *Von Neumann* v. *United States*, *supra*, 660 F.2d at 1324. Legally, the court's ruling was based on the denial of the opportunity for a prompt post-seizure judicial hearing. This right to procedural due process may always be waived. *Bodie* v. *Connecticut*, *supra*, 401 U.S. at 378-79.

> [T]he mere filing of a petition for remission . . . does not excuse the government from its obligation to commence prompt judicial proceedings until that petition is decided. This does not . . . preclude the parties from *agreeing* that judicial action should be postponed pending the resolution of an administrative claim; it simply prevents the unilateral adoption of that course by the government. *Ivers* v. *United States*, *supra*, 581 F.2d at 1371-72 (original emphasis).

The Customs' waiver form in use since 1979 permits the party-claimant to revoke his waiver at any time and obtain his constitutional and statutorily prescribed prompt judicial hearing. See 19 U.S.C. § 1603. In addition to promoting procedural regularity, this format fosters a feeling of being treated fairly by one's government. See *Carey* v. *Phipus*, 435 U.S. 247, 261 (1978). Elicitation of a knowing, consensual waiver of con-

stitutional rights also engenders respect for the law.[42] Similarly, in those unusual circumstances (according to petitioner less than 10% of Customs seizures) where the government elects to proceed criminally, any potential problem created by the right to a prompt post-seizure forfeiture hearing is obviated by a written waiver of the right.

Petitioner's remaining arguments for the application of criminal due process and speedy trial rules are equally without merit. The government argues that it may be collaterally estopped from proceeding in the more important criminal case if it fails to meet the lighter burden of proof in the forfeiture case, and speculates that forfeiture claimants with pending criminal cases will abuse the civil discovery rules and interfere with the government's prosecutorial efforts (PB. 24-25). These arguments are refuted by the authorities relied on in the government's brief. No cases are cited in which the government has been collaterally estopped at all, much less in a remotely similar situation. The speculation on potential abuse of the civil discovery rules is unjustified. Existing procedures and the sound discretion of the district courts can be relied on to keep this as yet unrealized threat in check. See *Founding Church Of Scientology* v. *Kelly*, 77 F.R.D. 378, 381 (D.C.DC 1977).

Any doubts that the government has about its forfeiture case can and will be resolved through its customary liberal use of the civil discovery process. Taking a claimant's deposition, a procedure obviously not available in criminal investigations, is sufficient. In those rare situations where the government goes forward with both a criminal prosecution and a forfeiture case, and the criminal defendant takes the Fifth Amendment, the forfeiture case can be stayed or continued by agreement between the parties, or on motion by the court.

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[42] The waiver form also overcomes any impediment created by 19 C.F.R. § 171.2(a).

In any event, it is the government who initiates both proceedings in the first place. In some extreme factual circumstances, petitioner may not be able to prosecute everything fairly and simultaneously. Just as a prosecutor often must choose between or among different criminal statutes covering the same acts, the same is true when the government seeks to prosecute criminally and use the *in rem* fiction to forfeit the defendant's property as well.[43] However, none of these difficulties existed in this case. Nor should national policy be shaped on petitioner's extreme examples. In the vast majority of those few criminal cases, defendants, due to Fifth Amendment considerations, will undoubtedly elect to waive their rights to a prompt forfeiture hearing and request an extension of time to submit their petition. Cf. *United States* v. *Flores*, No. 80-1705 (9th Cir. June, 1982). These simple time-proven procedures promote agreement between claimants and the government and avoid the waste of scarce judicial resources.

B. Due Process Requires The Seizing Agency, Not The Indigent Claimant, To Provide Adequate Procedures To Protect Against The Risk Of An Erroneous Deprivation Of Property. The Government's Suggested Alternatives, Always Available To The Rich, Have Been Previously Rejected By This Court And The Lower Courts, Are Conceptually And Practically Inadequate And Should Be Rejected Here.

Petitioner contends that even if the criminal rules of *Lovasco* or *Barker* do not control civil remedial *in rem* forfeitures (see

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[43] Indeed, modern forfeiture doctrine based on the offending *res* (here harmless legal tender) is a deliberate subversion of the ancient concepts which punished goring oxes and other domestic animals tried before regular courts in the Middle Ages. By resort to this fiction the government, with the approval of the courts, can continue to impose punishment on blameless or mistaken individuals. J. Finkelstein, "The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death And The Western Notion Of Sovereignty," 46 Temp.L.Q. 169, 252 (1973), cited in *State* v. *Rice*, 626 P.2d 104, 114 (Alaska 1981).

Helvering v. *Mitchell*, *supra*, 303 U.S. at 400), the 18-month unexcused delay in this case did not violate due process as that right has been interpreted by this Court's prior rulings in other civil cases (PB. 30).

Petitioner's analysis of Vasquez' property interest is flawed from its inception. First, petitioner continues to misapply *Stowell's* "relation back" doctrine urging that "the issue is simply what consequence to attach to a delay in quieting title to property that at all relevant times in fact belonged to the government" (PB. 30-31, n.24). A careful analysis of the mandatory forfeiture statute under consideration in *Stowell* (see discussion *supra* at pp. 23-25), and a mere reading of *United States* v. *United States Currency Totalling $48,318.08*, *supra*, 581 F.2d at 212-13, miscited by petitioner, refute this argument.[44]

Petitioner argues that if Vasquez did not like the treatment she received at the hands of her government, she, and all other forfeiture claimants, should resort to Federal Rule of Criminal Procedure 41(e) or bring a suit in equity at her own expense to obtain the return of her property.[45] The procedure petitioner advocates is conceptually inadequate, complicated, burdensome, time-consuming, neither anticipated by the statutory schemes enacted by Congress and followed by Customs nor adequate to ensure protection of an indigent claimant's rights. See *Wiren* v. *Eide*, *supra*, 542 F.2d at 764. Moreover, the same hackneyed arguments have been previously presented by the government and expressly and repeatedly rejected by the

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[44] United States currency, unlike marijuana, moonshine, explosives and other contraband (see generally 49 U.S.C. § 781) is property in which persons other than the government may possess rights up to the time of the forfeiture decree. *United States* v. *Eight (8) Rhodesian Stone Statues*, *supra*, 449 F. Supp. at 206.

[45] It is extremely unlikely that most claimants will have the perserverance and insight, let alone legal knowledge, to commence a collateral action *in forma pauperis*. *Wiren* v. *Eide*, *supra*, 542 F.2d at 764 n.9.

courts. In *United States* v. *Eight (8) Rhodesian Stone Statues*, *supra*, 449 F.Supp. at 205-06, the court wrote:

> To escape the results of its egregious conduct, the government asserts that it is not barred because (claimant) could and should have taken the initiative in various ways and could thus have obviated the effects of the government's procedural deficiencies and delays. . . .
>
> It seems clear to me that when the government has created the problem by seizing the citizen's property in the summary fashion employed in customs seizures (and the claimant does not immediately admit the propriety of the government's action), the claimant should not be at risk on account of his inaction and should not lose any rights on account thereof. A claimant ought not to be required to spend his own money to force the government to take action which the government is bound by law to take and take promptly. See *United States* v. *A Quantity Of Gold Jewelry*, *supra*, 379 F.Supp. at 288, n. 10.

More importantly, the government's position conflicts with this Court's prior decisions. In *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 78, n.9, this Court held that a Pennsylvania prejudgment replevin statute violated due process. The law required the party losing property through seizure to initiate a lawsuit to obtain a post-seizure hearing.

1. Addressing the seizure stage, the first of the three-stage forfeiture process, the government argues that Rule 41(e) is adequate to test the lawfulness of the seizure (PB. 31-32). Petitioner admits as it must that "there is not a complete correspondence of issues between a Rule 41(e) proceeding and the forfeiture action" (PB. 32). The Rule 41 motion focuses only on the lawfulness of the seizure based on the seizing agent's information at the time the property is obtained. In some cases (no statistics or "estimates" are provided here), the claimant may have an affirmative defense based on facts unknown to the seizing officers. This affirmative defense might defeat the forfeiture even though the seizure was supported by probable cause (PB. 32).

Despite the clear conceptual inadequacy of the Rule 41 motion, petitioner argues "The prompt filing of a civil forfeiture action is unnecessary . . . to afford adequate process to guard against unjustified seizures and to root out most instances in which seized property cannot ultimately be shown to be forfeitable" (PB. 32).

Simply put, the government's proposal does not satisfy due process. A decision on the merits of the motion is not dispositive of the forfeiture action. "Due process requires that there be an opportunity to present *every* available defense." *Lindsey* v. *Normet*, 405 U.S. 56, 66 (1972). This right includes an opportunity to defend against the forfeiture itself and not merely the seizure. Equally important practical reasons also invalidate petitioner's novel argument.

First, most district courts, understandably reluctant to exercise their supervisory powers where no criminal action is pending, may not even permit the motion to be heard. See *United States* v. *A Premises Known As 608 Taylor Avenue*, 584 F.2d 1297 (3d Cir. 1978). Virtually all claimants will need the aid of a lawyer whose services many otherwise indigent civil claimants cannot afford.

Second, in light of this Court's recent rulings, it is probable that only one Rule 41 motion will be allowed per claimant/defendant. If the client is under surreptitious criminal investigation, as Vasquez was, the claimant might bring the motion as a civil action to obtain the return of the money and then, many months or perhaps years later, be barred from bringing another motion to suppress evidence at the criminal trial. See *Allen* v. *McCurry*, 449 U.S. 90 (1980); *Stone* v. *Powell*, 428 U.S. 465 (1976). On the other hand, if the government informs the claimant/criminal defendant that she is under criminal investigation, defense counsel may desire to reserve his only motion to suppress for the criminal case and until after he has been provided discovery by the government.

Third, the evidentiary standard on a motion to suppress may be, as it was here, less than the probable cause standard

required, according to the government's brief, to justify seizure in the forfeiture trial. A ruling that Customs officers in a border search situation possessed the "mere suspicion" necessary to search a claimant like Vasquez does not necessarily confirm there was probable cause to seize the property for forfeiture.[46] It is a long way from the "mere suspicion" standard to the preponderance of evidence required by Congress to forfeit currency under Title 31. 1970 U.S. Code Cong. & Admin. News, p. 4404.[47]

2. As an alternative remedy to the timely hearing it is statutorily compelled to provide, petitioner seriously contends that a separate suit in equity is necessary to force it into action. This separate suit, presumably at claimant's expense, is even inferior to the Rule 41 motion. In addition to being expensive and unnecessarily duplicative of existing procedures, the equitable claim at best adds still another unnecessary judicial tier to the forfeiture process. For the proceeding described in *Slocum* v. *Mayberry*, 15 U.S. (2 Wheat.) 1, 9 (1817) does not permit resolution of the lawfulness of even the seizure—only the first of three stages in the forfeiture process. *In Re Behrens*, 39 F.2d 561, 563 (2d Cir. 1930).

Thus, under the government's design, claimants would first bring a Rule 41 motion to adjudicate the lawfulness of the seizure, followed by an equitable suit to compel the

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[46] The "mere suspicion" standard is easily satisfied, and many travelers will have legitimate reasons for failing to declare property lawfully seized under that lesser standard, including: travel fatigue, consumption of alcoholic beverages, poor eyesight, dyslexia, bad memory, confusion, mistake or accident.

[47] Due to the *in rem* fiction, a forfeiture claimant's testimony at an evidentiary hearing under Rule 41 is probably admissible against him during the government's case-in-chief at the forfeiture trial. Cf. *Simmons* v. *United States*, *supra*, 390 U.S. at 377. Thus, in the course of testifying against the government's basis for *seizing* the property, the claimant himself may provide his adversary with the reason it should ultimately be *forfeited*.

procrastinating officer to initiate the forfeiture action he is legally required to bring. Finally, the forfeiture suit itself would be filed. Yet, "[i]f forfeiture is to be sought, no reason appears for delay, every consideration of fairness and of economy requires promptness." *Id.* at 564.[48]

The government's misconduct in this case belies its claimed concern not to unnecessarily burden claimants as one of the reasons it delays filing forfeiture suits. The "working investigation" it ascribes to itself is refuted by the evidence. According to the record and its own arguments, Customs believed there were no facts to investigate for the forfeiture in this case.

Petitioner's proffered substitutes for the process due Vasquez and all forfeiture claimants would further drain rather than conserve scarce judicial resources. The government's real argument is that its own *pace* and *convenience* should be given priority over the fragile constitutional values the Due Process Clause was designed to protect. *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 90, n.22.

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[48] The remaining authorities cited in the government's brief are in the same vein (PB 33). *Castleberry* v. *Alcohol, Tobacco & Firearms Division*, 530 F.2d 672, 675 n.6 (5th Cir. 1976), clearly illustrating one district court's sense of outrage over the government's unjustified delay, also underscores the futility of an equitable action:

> A requirement that the Treasury agents institute forfeiture proceedings promptly or else return the property and abandon the seizure, and at the same time following the admonition of the *Behrens* court that the legality of the seizure itself is to be determined in the forfeiture proceedings and not as an aspect of the present action, appears to us to be the limit of the relief a district court may grant in this situation. (Footnote omitted.)

II

THE COURT OF APPEALS PROPERLY FOUND THAT THE GOVERNMENT FAILED TO PROVIDE CLAIMANT A PROMPT POST-SEIZURE JUDICIAL HEARING AND THAT THE DELAY WAS UNJUSTIFIED

A. The Facts Of This Case Demonstrate That, Absent An Express Voluntary Waiver, The Time For Filing A Civil Currency Forfeiture Suit Was Not Tolled By Vasquez' Submission Of An Administrative Petition.

We submit it is important to realize the inherent limitations of the administrative process in currency forfeiture cases. The administrative petition is generally not a substitute for the prompt judicial hearing required by due process. *Ivers* v. *United States*, *supra*, 581 F.2d at 1371. The facts of this case and petitioner's argument clarify this point.

First, the administrative process does not offer a real hearing, only a secret, one-sided determination of facts decisive of the claimant's rights. Fairness can rarely be obtained in such a setting. *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123 at 170-72 (1951) (Frankfurter, J., concurring). Vasquez' alleged "interview" on her petition was only a subterfuge to collect incriminating information for use against her in the criminal case. She was never given reasons for the denial of her petition. Nor was she allowed to depose or examine the customs officer who denied the petition (R. 176; J.A. 85). The administrative decision in this case was secret and effectively annonymous. The most basic elements of the hearing were not met.[49]

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[49] See *Fines, Penalties & Forfeitures Handbook*, *supra*, at p. 119 (requiring findings and reasons on which administrative decisions are based); *United States* v. *One 1972 Chevrolet Blazer, Etc.*, *supra*, 563 F.2d 1386, 1389-91, n.14 (9th Cir. 1977) (Customs failure to follow governing regulations and give a claim the consideration required by 19 U.S.C. § 1618 required reversal of forfeiture decree and remand to district court for consideration of [1] adequacy of the remission process, and [2] the propriety of the forfeiture).

Second, due process requires a hearing that is subject to judicial review. If the government is correct, the Secretary of the Treasury's or his delegates' decisions on petitions brought under 19 U.S.C. § 1618 and 31 U.S.C. § 1104 are never subject to judicial review because these decisions are matters of executive grace analogous to the pardon power (PB. 40-45). But cf. *United States* v. *United States Coin and Currency*, *supra*, 401 U.S. at 721; *United States* v. *Edwards*, 368 F.2d 722 (4th Cir. 1966); *Contonifico Bustese, S.A.* v. *Morgenthau*, 121 F.2d 884 (D.C.Cir. 1941) (Rutledge, J.). *Contra, United States* v. *One 1972 Chevrolet Blazer, Etc.*, *supra*, 563 F.2d at 1389-91, n.14; *United States* v. *One 1974 Mercury Cougar XR-7*, 397 F.Supp.1325 (C.D.Cal. 1975).

Moreover, the remission process was never designed to determine the propriety of either the *seizure* or the *forfeiture*. *Wiren* v. *Eide*, *supra*, 542 F.2d at 761 citing *Simmons* v. *United States*, 497 F.2d 1046 (9th Cir. 1974). These factual and legal questions were reserved by Congress for the judicial fact finding process. Their judicial determination requires "the fine resolution of conflicting evidence that a . . . preponderance standards demands. . . ." *Gerstein* v. *Pugh*, 420 U.S. 103, 121 (1975). A negative administrative decision by Customs does not resolve these factual and legal issues, although a decision granting relief may avoid the judicial trial. Thus, absent an express waiver from the claimant (*Ivers* v. *United States*, *supra*, 581 F.2d at 1373), the mere submission of an administrative petition cannot and should not relieve the government of its legal obligation to promptly commence a judicial forfeiture action.[50]

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[50] The record of the early Congressional debates on the remission process demonstrates a concern with the judicial fact finding process. Some members of the Congress believed that permitting the executive branch to decide petitions for remission or mitigation of forfeiture violated the doctrine of separation of powers because these issues were primarily judicial questions. 6 Annals of Cong. 2284-92.

1. The government assumes that because in 90% of the Customs forfeiture cases, administrative petitions are filed, this remedy is all claimants' sole prospect for re-acquiring their property. The point of the government's argument is that it usually wins forfeiture trials anyway. Thus, claimants who have no right to their property should not complain if the government takes several years to deny their petitions (PB. 37-41). This startling proposition is based on the misconception that currency forfeiture claimants have (1) no real interest in their property once the government relieves them of it, and (2) that the government's alleged higher percentage of victories is dispositive under the Due Process Clause. By this latter reasoning, criminal trials too would be abolished. For they are burdensome, costly, time-consuming and in the vast majority of cases the government wins. Petitioners "statistical" approach to due process places a premium on speed and efficiency for its own convenience and trivializes the higher constitutional values embodied in the Due Process Clause. See *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 90, n.22.

Given the overall unfairness and general absence of constitutional protections for claimants in civil currency forfeiture cases, there are many potential advantages to the administrative process. See Charney, "The Need For Constitutional Protections For Defendants In Civil Penalty Cases," 59 Cornell L.Rev. 478 (1974). Administrative proceedings are informal, inexpensive and may, if correctly applied, obviate the need for judicial action. *Von Neumann* v. *United States*, *supra*, 660 F.2d at 1326; *Ivers* v. *United States*, *supra*, 581 F.2d at 1370; *United States* v. *A Quantity Of Gold Jewelry*, *supra*, 379 F.Supp. at 287; *United States* v. *One 1971 Opel GT*, *supra*, 360 F.Supp. at 611.

Vasquez' complaint below was not directed at the generally salutary objectives of the remission process, but at the way that process was applied to her. The administrative goals were not only unsatisfied but subverted. The record is clear that the claimed delays for investigation of her petition were bogus. Agent Pompeo candidly admitted that during the period of October '75-May '76, her "mind was made up" to charge Vas-

quez criminally (Tr. 205-07).[51] No additional investigation was reasonably necessary to gather evidence to prove the government's case. Cf. *United States* v. *Lovasco*, *supra*, 431 U.S. at 791.[56] The delay in interviewing Vasquez was totally irrelevant to any bona fide investigative purpose, such as the decision to proceed criminally or civilly in this matter. At best, the interview finally held on March 5, 1976, served only to cross off one item on Customs' bureaucratic check list (Tr. 206-07).

The record establishes that the government exercised bad faith, failed to follow its own rules and manufactured reasons after the fact to justify its own misconduct.

The government has consistently failed to make any showing that the 72-hour time limit for deciding administrative petitions set by the Second Circuit in 1976 has proved unreasonable. *Von Neumann* v. *United States*, *supra*, 660 F.2d at 1327. Nevertheless, the "dangers," "burdens," and "pressures" the government claims that the imposition of a reasonably prompt time period for deciding administrative petitions will place upon it are also answered by the time waiver form. There is no apparent legal impediment to conditioning administrative review on a consensual waiver of a prompt post-seizure judicial hearing. *Ivers* v. *United States*, *supra*, 581 F.2d at 1373. The revocable waiver may apply for a fixed or indefinite time period. During this agreed upon interval, currency can be placed in an interest-bearing account, and Customs can investigate the petition. The second stage in the forfeiture process, at-issue here, will no longer be a source of controversy (Br. in Opp. 15-16).

This proposal, in effect since 1979, is in harmony with any claimed Congressional preference for administrative review, accomodates all legitimate governmental and private interests, is simple, economical and fair.[52]

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[51] The amount in controversy was under $25,000. Thus it was not necessary to refer this case to Customs Headquarters in Washington, D.C. 19 C.F.R. § 171.21.

[52] Petitioner's cited portion of H.R. No. 95-621, 95th Cong. 1st Sess. 11 (1977) only states that in those cases where no petition is filed, the matters will be referred immediately to the United States

"The informal, remedial nature of the administrative petition makes rapid processing essential." *Von Neumann* v. *United States*, *supra*, 660 F.2d at 1324. Moreover, the express consensual imposition of time limits on the administrative scheme, saves it from serious constitutional defects. See, e.g., *Stypmann* v. *City and County of San Francisco*, *supra*, 557 F.2d at 1344; *Lee* v. *Thornton*, *supra*, 538 F.2d at 33; *Pollgreen* v. *Morris*, *supra*, 496 F.Supp. at 1051-53; 10 C.F.R.§ 171.12(b). See generally, 19 C.F.R.§ 171.11-171.33; *Fines, Penalties & Forfeitures Handbook*, *supra*, at p. 21-22, 25-26).

2. The government's arguments based on this Court's decisions in civil due process cases regarding statutory entitlements are also misplaced (PB. 42-45). In the cases relied on by petitioner protected liberty or property interests had already been finally taken, or this Court determined there had never been a constitutionally protected interest. See *Board of Regents* v. *Roth*, 408 U.S. 564, 671 (1972). There can be no question that Vasquez possessed a significant interest in her currency, and even petitioner grudgingly agrees (see discussion *supra* at pp. 23-25; PB. 30).

Petitioner's contention that Vasquez had no right to a prompt or speedy administrative determination of her petition for the return of property seized but not yet judicially forfeited to the government confuses several distinct issues: (1) her property interest in the money; (2) her procedural due process right to a prompt post-seizure judicial hearing to contest the government's claim for forfeiture of that money; (3) the government's unjustified delay in deciding her administrative petition, and (4) the government's unjustified delay in provid-

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Attorney. No mention is made of *how long* the period for administrative review may be in those cases where petitions are filed. Indeed, the cited portion of the House Report can be read to mean that 60 days is the period for administrative review. Further, since Congress is presumed to have knowledge of the decisional law at the time it amended 19 U.S.C. § 1603, it does not follow that it intended, as petitioner argues, to permit Customs to take any period of time, to and including, five years, to render its decision.

ing a prompt post-seizure judicial hearing. There was no impermissible taking within the meaning of the Due Process Clause in the cases relied on by the government, because there was no property or liberty interest in issue. The same might be true here if Vasquez had filed her petition after the propriety of the *seizure* and *forfeiture* had been proved to a court or jury's satisfaction by a preponderance of the evidence as required by Congress, at a promptly convened, post-seizure judicial hearing.

Further, Customs' own regulations for deciding administrative petitions impose time limits on that agency at each stage of the process. *Fines, Penalties & Forfeitures Handbook*, *supra*, at pp. 21-22, 25-26. These regulations entitled Vasquez to a prompt decision on her petition supported by factual findings and conforming to law. *Id.* at 119.

> [C]entral to our concept of due process . . . (is a judgment) . . . that government officials no less than private citizens are bound by rules of law. Where individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged. See *Vitarelli* v. *Seaton*, *supra*, 359 U.S. at 547, 79 S.Ct. at 976 (Frankfurter, J., concurring in part and dissenting in part). *United States* v. *Caceres*, 440 U.S 741, 758-59 (1979) (Marshall, J., dissenting).

Thus, if Customs is required to follow its own standards, Vasquez was entitled to a prompt determination of her administrative petition.

B. In This Case, None Of The Reasons Advanced By The Government Excused Its Failure To Promptly File A Civil Forfeiture Action

Vasquez does not contend that a criminal investigation or prosecution can never excuse a delay in providing a judicial hearing in a forfeiture case. Her position, and the rule in virtually every circuit which has considered the question, is that the circumstances of each case determine the reasonable-

ness of the delay.[53] Testimony by Customs' witnesses destroyed petitioner's claim to any bona fide administrative investigation as an excuse for delay in filing the forfeiture case (see pp. 43-44, *supra*). The record of the criminal investigation is similarly deficient (see pp. 4-9, *supra*). Indeed, no one knows if any criminal investigation was ever conducted by the agencies Pompeo claimed to have consulted (J.A. 73).

The authorities cited by the government, for the proposition that a criminal investigation always justifies a delay in commencing the forfeiture suit, are inapposite. With but one exception, the delays in peitioner's authorities were substantially shorter, and real criminal investigations were conducted. See, e.g., *Shea* v. *Gabriel*, 520 F.2d 879, 880, 882 (1st Cir. 1975) (one-month delay). In still another case, the claimant pled guilty to the criminal currency charge and the criminal investigation continued after the guilty plea.[54]

Vasquez emphasizes that the government controls the choice and order of remedies. It seizes the property, often retains it for years while the *res* depreciates in value, and then unilaterally decides the sequence of multiple prosecutions. Because the action is nominally civil, the forfeiture claimant is denied virtually every consitutional protection afforded the criminal defendant. Charney, "The Need For Constitutional Protections For Defendants In Civil Penalty Cases," *supra*, 59 Cornell L.Rev. at 480-82. On many occasions, the currency

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[53] Although the cases go both ways factually, this appears to be the rule in the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and Eleventh Circuits. See notes 27 and 28, *supra*, and *United States* v. *One 1973 Buick Riviera Auto*, 560 F.2d 897 (8th Cir. 1977).

[54] *United States* v. *Thirty-Six Thousand One Hundred & Twenty-Five Dollars ($36,125.00) In United States Currency*, *supra*, 510 F. Supp. at 307-08.

In *United States* v. *One 1976 Mercedes 450 SCL*, 667 F.2d 1171, 1175 (5th Cir. 1982), the court found the delay justified where the claimant was found guilty of the parallel criminal charge and the time delay and sequence of prosecutions assisted the claimant by enabling

may be the claimant's only means of retaining counsel for the criminal and forfeiture actions. See *United States* v. *Jones*, 369 F.2d 213, 219 (7th Cir. 1966), *cert. denied sub nom*, *Watkins* v. *United States*, 386 U.S. 944 (1967). Thus, the *in rem* forfeiture fiction uniquely enables the government to control the quality of the claimant's representation where mere seizure, as here, renders the claimant effectively indigent.

Though deferral of the forfeiture action may be convenient to the government's lawyers, a speedy determination of the forfeiture question may be required to avoid substantial impairment or denial of the claimant's Sixth Amendment right to the counsel of choice in the criminal trial. *Id.* The Speedy Trial Act also increased the need for the prosecution to proceed with dispatch.

In those statistically infrequent cases where the government elects to exercise all of its statutorily conferred powers and in effect prosecute the same person twice for the same acts, it should not be heard to complain about doing so in accordance with the law. It is the government's own choice to pursue dual sanctions which places the "pressure" on the investigating agency or the lawyers in the United States Attorney's Office. Unreasonable delay cannot be condoned for this reason.

Consider the "pressure" on the citizen. It is obvious that Vasquez could have simply divided the $8,850 between herself and her traveling companion if she wanted to avoid the $5,000 reporting requirement (Tr. 661). For her common mistake and lack of guile, she faced incarceration, fines, civil penalties and forfeiture. These Draconian sanctions were seriously pursued for her failure to declare non-dutiable, non-taxable, non-

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him to advance inconsistent factual defenses at the criminal and forfeiture trials. *Id.*

In *United States* v. *$40,454 In United States Currency*, 469 F. Supp. 1041, 1044 (W.D.Wa. 1975), the court assumed without analysis that the money was necessary as evidence in the criminal trial. As we have shown, this conclusion is mistaken, and the money was not so used here.

contraband United States currency. Other, similarly situated citizens were permitted to amend their declarations and properly declare the property (Tr. 584). Indeed, far from justifying a delay in the commencement of the forfeiture trial, criminal prosecution in this case was itself contrary to the purpose of the law—keeping Americans from secreting money in foreign bank accounts. 1970 U.S. Code Cong. & Admin-.News, p.4397-98.

III

DISMISSAL WAS THE CORRECT REMEDY IN THIS CASE

Try as it might, the government has been unable to make this into a commercial crime case. There are no "criminal pocketbooks" to strike at here. The government's conduct was far more egregious than claimant's mistaken failure to fill out a form. Return of the seized property is the historically appropriate sanction for the government's failure to proceed promptly with a forfeiture action. See *Slocum* v. *Mayberry*, *supra*, 15 U.S. (2 Wheat.) at p.9.

Petitioner argues that in those infrequent instances where a claimant wins the forfeiture case, the dismissal remedy is insufficient to compensate him for damages incurred (for depreciation and/or loss of use of the property), during its unjustified retention (PB. 47-48). The short answer to this is that the return of the property and a *Bivens* counter-claim for damages are available to the party so aggrieved. *Seguin* v. *Eide*, *supra*, 645 F.2d at 811-12.

The deterrent value of the dismissal sanction is its own justification. Forfeiture of the government's right to forfeiture is a clear "bright line rule," easily understood by law enforcement officers. *United States* v. *Ross*, No. 80-2209 (June 1, 1982). Dismissal of this civil lawsuit is particularly appropriate where government officers violated their own rules, the statutory and case law, and the Constitution they are sworn to uphold.

Petitioner argues that it is unreasonable to terminate the government's right to forfeit property, arguing by analogy to

Fuentes v. *Shevin*, that the presence of a due process violation does not serve to extinguish the underlying debt. This analogy is misconceived. The civil creditors in cases like *Fuentes* v. *Shevin* were not agents of the state. They neither drafted nor broke the rules held violative of due process. Further, those debtors had at least signed contracts agreeing to pay for the items they purchased. Here, not even the district judge knew of the Reporting Act requirement.

In the United States, the fictitious *in rem* forfeiture doctrine is entirely the creation of statute designed to raise revenue. See *United States* v. *Laurenti*, 581 F.2d 37, 41 n.12 (2d Cir. 1978), *cert. denied*, 440 U.S. 958 (1979). Unusually trivial, *malum prohibitum* acts provide the government with extremely severe sanctions and windfall profits. Return of the seized property is a valid measure in a case such as this, where other citizens were given an opportunity to file the 4790 Form after making the same error Vasquez did. Moreover, dismissal is a sanction routinely employed in civil cases for far less serious conduct than that performed here by the government. See, e.g., *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976). Indeed, the United States sought to strike Vasquez' claim and answer as a sanction for her attorney's mistaken failure to attend a deposition (R. 18-25).

In rem forfeiture statutes have been in effect in this country for approximately 200 years. Petitioner has cited no case, and claimant knows of none, where the government's proposed novel remedy has been used.

CONCLUSION

The government's conduct and the delay it created were unjustified. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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Petitioner's Reply Brief

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No. 81-1062

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

EIGHT THOUSAND EIGHT HUNDRED AND FIFTY DOLLARS ($8,850) IN UNITED STATES CURRENCY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief we argued that, except in cases of prejudicial and improperly motivated delay, there is ordinarily no requirement in the Due Process Clause of the Fifth Amendment that the government initiate a prompt post-seizure judicial forfeiture action. We showed that in this case, where the seizure of claimant's currency was concededly valid and no factual issues regarding the forfeitability of the currency existed, mere delay in filing a complaint could not possibly have prejudiced claimant. Alternatively, we argued that even if a prompt, post-seizure judicial hearing would normally be required, delay in bringing a judicial action was justified in this case because the claimant had petitioned the Secretary to

remit or mitigate the forfeiture and the request was being investigated, and because a related criminal investigation was pending, which could have been jeopardized by discovery available in a civil forfeiture action. Finally, we argued that even if the delay in this case violated due process, return of the currency was an inappropriate and disproportionate remedy, since the claimant has no legitimate claim to the seized property and had suffered no actual injury as a consequence of the delay. Claimant has responded to these points in ways that warrant a brief reply.

1. Claimant admits that our argument that civil forfeiture and criminal cases often are interrelated, and thus delay in investigations in the former situation should be governed by the standards for the latter announced in *United States* v. *Lovasco*, 431 U.S. 783 (1977), "sound[s] syllogistically valid" (Br. 28). She nonetheless attempts to avoid *Lovasco's* requirement that prejudice and bad faith be shown in order to state a due process violation due to delay by claiming (1) that the government's interest in criminal cases is greater than in civil forfeiture cases, (2) that the procedural settings of criminal and forfeiture cases are materially different, and (3) that the claimant's loss from a forfeiture can be more substantial than a defendant's loss from a criminal conviction. None of these distinctions is persausive.

When there is an overlap, as in this case, between the criminal and the civil forfeiture investigation, the government's interest in both situations is identical—to investigate possible criminal activity thoroughly and punish it. Similarly, as we explained more fully in our opening brief (Br. 22-27), in both situations the government has an interest in pursuing its investigation carefully and in not being forced to disclose

its intentions or evidence prematurely. Simply because the government settles numerous forfeiture cases without a civil or criminal trial does not diminish the government's interest in those cases that involve suspected criminal behavior.

Claimant's second distinction is difficult to fathom. It is certainly peculiar to argue that since due process has not generally been construed to require the same panoply of procedural protections for forfeiture claimants as for criminal defendants, due process must suddenly be held to provide greater protection with respect to this particular procedural issue common to both types of cases. The argument is particularly weak in light of the irrelevance in most forfeiture cases of the timing of the hearing to the ability to reach a fair disposition of the case on the merits. In short, claimant has offered no sound reason why with regard to delay, as with other procedural issues, a forfeiture proceeding should be hedged about with any more protections than a criminal trial.

Finally, claimant's assertion that her interest in this currency is greater than many criminal defendants' interest in their liberty, because the latter may receive only a fine or probation, is nonsense. Regardless of the potential monetary consequences, the stigma that attaches to a criminal conviction is completely absent in a civil forfeiture case. Cf. *Addington* v. *Texas*, 441 U.S. 418, 428-429 (1979). Indeed, if claimant were correct about the relative importance of the outcome of these proceedings, then the list of protections afforded criminal defendants set out in claimant's brief (Br. 29) would long ago have been extended to civil forfeiture claimants. In sum, claimant has failed to present any persuasive reason why the requirement of improper motivation and prejudice

in pre-indictment delay cases and the central role of these factors in post-indictment delay cases should not govern post-seizure delay cases.[1]

2. Although not precisely cast in terms of *Lovasco*'s "intentional misconduct" requirement, claimant does appear to assert on several occasions (Br. 12, 40, 43-44) that the government did act in bad faith in the investigation of the remission petition. In making this argument, however, claimant completely disregards the record in *this* case and constructs a new case based on selected portions of the record in her previous criminal trial. None of that evidence (which we most emphatically do not concede to create even a remote suspicion of bad faith) is a part of this record. Based on the record in this case, and contrary to claimant's assertion (Br. 8), the district court expressly found that the Special Agent, who testified in this case, engaged in a proper criminal investigation and that all of the delay was completely "reasonable" (Pet. App. 18a). The court of appeals did not question this finding, concluding instead simply that the delay could in no event be justified by the pendency of administrative or criminal investigations when the government already possessed sufficient evidence to bring the forfeiture action (*id.* at 4a). In sum, there is simply no basis whatsoever in this record for concluding that the government acted in

[1] We note that the danger of prejudice from delay in instituting forfeiture proceedings is generally less than from delay in commencing criminal prosecution. An individual whose property has been seized for forfeiture normally has advance notice of the event and can marshal his case to resist the forfeiture, whereas the criminal defendant may not be aware of the prospect of future prosecution.

bad faith with regard to any aspect of claimant's case.[2]

3. We mentioned in passing in our opening brief (Br. 30), in relation to the magnitude of the claimant's property interest, the doctrine that a forfeiture takes effect immediately upon commission of the forfeitable act. Claimant contends (Br. 23-25) that her interest in the seized currency is more substantial than we suggested because the "relation back" doctrine that ordinarily vests title to seized property in the United States at the time a forfeitable offense is committed does not apply to forfeitures of currency under 31 U.S.C. 1102. Initially, we note that whether title actually passed to the United States at the time claimant falsely denied her possession of currency in excess of $5,000 is largely irrelevant; we conceded in our opening brief that claimant should be treated as having retained sufficient interest in the currency to trigger a due process inquiry. This interest is not materially greater simply because she may retain abstract "title" in the property; she still has failed to make any showing that forfeiture was anything but completely justified as a substantive matter in this case. Thus, the primary concern of due process—to

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[2] Claimant asserts (Br. 5, 50) that agents testified in her criminal case that other persons making mistaken customs declarations were allowed to amend their forms. The regulation cited by claimant (19 C.F.R. 148.16(a)), however, expressly forbids an amendment after an undeclared or improperly declared article is discovered (19 C.F.R. 148.16(b)). Moreover, the agent actually testified that he had never "experienced this particular thing happening" and "[i]n regard to currency I don't recall hearing that this has happened" (Cr. Tr. 584-585). Thus, claimant was not treated differently from any other individual who attempts to bring in undeclared currency.

guard against unwarranted government deprivation of property—is in no way affected by her statutory claim to title.

In any event, claimant's argument, which is based solely upon dictum in a single court of appeals opinion (*United States* v. *Currency Totalling $48,318.08*, 609 F.2d 210 (5th Cir. 1980)), is without merit. Claimant argues that relation back is proper only when Congress specifies that seized property "shall be forfeited," as was the case in *United States* v. *Stowell*, 133 U.S. 1 (1890), but not when, as in this case, the statue declares that the seized property is "subject to forfeiture." Concededly, the Court in cases dating back to the early 19th century (*United States* v. *Grundy*, 7 U.S. (3 Cranch) 337 (1806); *United States* v. *1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814); *Henderson's Distilled Spirits*, 81 U.S. (14 Wall.) 44 (1871)) focused on the mandatory language of the statute forfeiture involved. But the basic rule is:

> Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either vest immediately, or on the performance of some particular act, *as shall be the will of the legislature.* This must depend upon the construction of the statute.

United States v. *Grundy*, *supra*, 7 U.S. (3 Cranch) at 351 (emphasis supplied).

The fatal flaw in claimant's argument is that there is not one shred of evidence that Congress intended to modify the normal relation back rule when it provided that undeclared currency is "subject to forfeiture." Nor is there even any plausible explanation offered for why Congress would decide to deprive the

government of the advantages of the relation back doctrine, which cuts off all third party claims arising after the seizure, in cases involving seized currency. We submit that more than a mere stylistic difference in statutory language is required before a court could reasonably conclude that the traditional relation back rule was discarded by the legislature.

The Ninth Circuit itself has stated that the relation back doctrine applies to forfeiture under 31 U.S.C. 1102. See *Ivers* v. *United States*, 581 F.2d 1362, 1367 (1978). And Section 1102 is not the only forfeiture statute where Congress has used the "subject to forfeiture" language. All items used in illegal controlled substances transactions, including the illicit drugs themselves, are "subject to forfeiture" (21 U.S.C. 881). No one can seriously contend that Congress intended to treat those forfeitures differently from forfeitures of property used to violate the Internal Revenue laws (26 U.S.C. 7301), although the latter property "shall be forfeited." Compare *O'Reilly* v. *United States*, 486 F.2d 208 (8th Cir. 1973) (relation back applies to 21 U.S.C. 881), with *United States* v. *One 1967 Chris-Craft 27 Foot Fiber Glass Boat*, 423 F.2d 1293 (5th Cir. 1970) (relation back applies to 26 U.S.C. 7301).[3] The only sustainable

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[3] Claimant somehow finds (Br. 25) support for her analysis in a statement in the House Report accompanying the Bank Secrecy Act, 31 U.S.C. 1051 *et seq.*, that indicates that the government may have the burden to prove the elements of forfeiture by a preponderance of the evidence. The relevant discussion appears under the heading "Procedure For Recovery For [*sic*] Civil Penalty," which states:

> The civil penalty provisions in sections 125 and 207 of the bill, as well as the forfeiture provision in section 232 would all be governed by chapter 163 (sections 2461 through 2465) of title 28, United States Code. These provisions established a five-year statute of limitations, put the burden of proof on the Government, and require

conclusion is that the relation back doctrine does apply to the instant forfeiture, and claimant's interest in the seized currency was no more than the minimal property interest we described in our opening brief (Br. 30 n.24).

4. Claimant broadly asserts (Br. 14-15) that the Constitution gives her an absolute entitlement to a prompt judicial hearing to determine the validity of the seizure and forfeiture of her currency,[4] even

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proof by a proponderance of the evidence. This burden is less strict than the "beyond a reasonable doubt" test applied in criminal actions.

H.R. Rep. No. 91-975, 91st Cong., 2d Sess. 19 (1970).

In our opening brief we assumed that Congress had intended the burden of proof in cases arising under 31 U.S.C. 1102 to be that provided in 19 U.S.C. 1615 (the government must show probable cause, and the claimant then has the burden to prove the property is not subject to forfeiture by a preponderance of the evidence), because Customs administers the currency reporting requirements and nothing in the statute itself indicates to the contrary. In light of the House Report, it is arguable that we were mistaken in our assumption, since the government does have the burden to prove forfeiture by a preponderance of the evidence under 28 U.S.C. 2461(a). See *Compton* v. *United States*, 377 F.2d 408, 411 (8th Cir. 1967).

But even assuming that the government has the burden of proof, the heightened burden does nothing to advance claimant's case. There is still no factual dispute as to whether the currency is subject to forfeiture. Nor does the burden of proof have anything to do with the relation back doctrine. Indeed, the higher burden does little more than increase the need for administrative investigation prior to institution of judicial action and enhance the likelihood that delay will injure the government and not the claimant in the trial of the forfeiture action.

[4] Claimant asserts without explication (Br. 19-20) that the delay here violated the requirements in 19 U.S.C. 1602-1604 and the Customs Service's time requirements in its *Fines*,

though she never requested one. But due process does not automatically require a judicial trial immediately after a seizure of property; it merely requires an opportunity to be heard "'at a meaningful time.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). In a case such as this, where there are no factual disputes, it is completely unjustified to hold that a proceeding commenced 18 months after the seizure (less than one-third of the period permitted by the applicable statute of limitations) was somehow too late.[5]

Penalties and Forfeitures Handbook (rev. ed. Mar. 1979). Claimant did not, however, preserve these arguments in the courts below, and the court of appeals rested its decision solely on constitutional grounds. Moreover, as we showed in our opening brief (Br. 40), Congress did not intend 19 U.S.C. (Supp. V) 1603, as amended in 1978, to interfere with the administrative scheme for disposing of the vast majority of forfeiture cases. Thus, the statutory promptness requirement permits delay pending the outcome of administrative review. Finally, claimant herself (Br. in Opp. 2-3) has pointed out that the requirements in Title 19 do not directly apply to forfeitures under the Bank Secrecy Act.

With regard to the Customs Handbook, it is an internal document for use by the Service which sets precatory time limits designed to expedite the administrative process. But the Handbook merely provides instructions on how to apply the forfeiture laws; it was not intended to impose any obligations on Customs that are more onerous than the statutes. Cf. *United States* v. *Caceres*, 440 U.S. 741 (1979). More importantly, it was prepared in 1979, long after the Customs process in this case was completed. The only issue properly in this case is whether the delay violated due process.

[5] The Ninth Circuit has recently reconfirmed its view that the existence of a factual dispute is irrelevant in determining whether a hearing is provided at a meaningful time. In *United States* v. *Two Hundred Ninety-Five Ivory Carvings*, 689 F.2d 850, 855 (9th Cir. 1982), the court held that the claimant's prior guilty plea to making false statements to a Customs

On the contrary, the constitutional sufficiency of the timing of the suit will depend on the reasons for the delay, the injury (if any) to the private claimant resulting from the delay, and the availability of alternative procedures by which individuals aggrieved by a delay may obtain adjudication of their rights.

We pointed out in our opening brief (Br. 30-37) that opportunities to be heard are amply provided to civil forfeiture claimants who believe they have legal grounds to contest the seizure or forfeiture or who believe that the judicial forfeiture action is being unreasonably delayed. In response to this argument, claimant asserts (Br. 36-40) that the existing alternatives—a Rule 41(e) motion for return of improperly seized property or an equitable action to compel the government to file a forfeiture proceeding or to return the seized property—are inadequate. But claimant does not deny that these are "opportunities" to be heard; the real reason these alternatives are inadequate to her is because the seizure in this case was perfectly legal and forfeiture is completely warranted. Accordingly, neither process would have been

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Agent during the transaction giving rise to the seizure of the carvings was irrelevant to the government's obligation to provide a prompt judicial proceeding. Similarly, in *United States* v. *One Each Pear Shaped Diamond Approximately 2.53 CT*, No. 80-4551 (Aug. 20, 1982), the court held that a guilty plea to smuggling the jewelry, which collaterally estopped the claimant to deny the facts with respect to the forfeiture, was not sufficient to justify delay in bringing a forfeiture action. See also *United States* v. *Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency*, 689 F.2d 858 (9th Cir. 1982). These decisions make plain that the Ninth Circuit's time limits are in no way designed to protect any real interests of the claimants; they are simply judicially imposed arbitrary deadlines for regulating administrative practices.

of assistance to her. But then nothing, including a prompt judicial forfeiture proceeding, could have helped her establish a legal right to return of the currency, for she indisputably possessed no such right. On the other hand, for individuals who, unlike claimant here, do have a valid dispute with the government with regard to the merits of a forfeiture and actually desire prompt adjudication of the legality of the government's actions, these alternatives are totally adequate to assure as prompt a disposition of the case as the particular claimant is interested in receiving.[6]

5. With regard to the effect of the administrative mitigation process on the need for a prompt judicial proceeding, claimant argues (Br. 41-43) that the mitigation process is an inadequate substitute for a judicial hearing because it lacks procedural protections comparable to those provided in the judicial forfeiture trial. But this argument completely misses the point. The administrative process is not a procedural substitute, but rather a substantive substitute, for the judicial forfeiture. In most cases, and claimant does not dispute this point, the mitigation process supplies the only realistic prospect for return of any of the seized property. This conclusion is supported not solely by the large number of administrative petitions filed, as claimant asserts (Br. 43), but rather because the substantive standards for forfeiture are easily met in most cases where property is

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[6] The only exception is in cases in which there is an ongoing criminal investigation that could be jeopardized by the litigation of a civil action relating to the subject matter of the potential criminal prosecution. In that situation, as we argued in our opening brief (Br. 24-26), the government's interest in deferral is paramount to the claimant's interest in a hasty filing of a civil forfeiture complaint.

seized. Accordingly, the vast majority of claimants prefer the administrative process to the judicial forfeiture action, in which they have no realistic hope of securing relief. Indeed, claimant demonstrated the same preference until her petition was denied; she *never* requested that her case be submitted promptly to the courts. In sum, the procedural adequacy of the remission process is irrelevant, especially because claimants generally can cause the prompt filing of a judicial forfeiture proceeding by the simple expedient of withdrawing their administrative petition. The conclusion remains unshaken that the mitigation process serves as a compelling justification for delay in filing the forfeiture complaint because it is substantively advantageous to claimants and in no way undermines their procedural rights—denial of the petition is still followed by a judicial proceeding—while at the same time saving a tremendous amount of judicial and governmental resources.[7]

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[7] In this context claimant reasserts (Br. 43-44) the alleged bad faith of the agent in dealing with her administrative request for relief. But this argument is completely undermined by the contrary findings of the district court regarding the reasonableness of the agent's conduct, which are fully supported by the record. Claimant also argues (Br. 44) that a better solution would be for Customs to require a formal waiver of the right to an immediate judicial hearing. We have no quarrel with claimant's proposal as a matter of policy; Customs already provides for such a waiver in most cases. But claimant has not explained why her proposal is constitutionally required. Analyzing waiver before considering the constitutional requirements clearly places the cart before the horse. Moreover, claimant is hardly in a position to complain about waiver. The only difference between some claimants today and this claimant is that she did not receive a letter indicating that no judicial hearing would commence while the administrative petition was pending. But claimant does not contend

Claimant also argues (Br. 22) that delay pending the outcome of the criminal trial was completely unjustified because the currency was not used as evidence and the criminal trial could not have resolved the forfeiture issue. The district court found, however, that the possibility that the currency would be used as evidence was a reasonable basis for postponing a decision on the mitigation request until after trial (Pet. App. 19a). In addition, it is clear that if claimant had been convicted under 31 U.S.C. 1058, the effect would have been to preclude relitigation of the forfeiture issues. See *Ivers* v. *United States*, 581 F.2d 1362, 1366-1367 (9th Cir. 1978).

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that she was unaware that this was so. Lack of express notice did not prejudice her rights because she had no interest in a quick judicial determination of her "claim" to the currency.

Moreover, a recent decision, of the Ninth Circuit casts serious doubt on the validity of claimant's waiver theory. In *United States* v. *Forty-seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency*, *supra*, the court declined to consider whether any waiver was effected by submission of a claim for remission, even though the Customs letter stated clearly that a petition would in effect be a request that the Service "*not* * * * refer the matter to the United States Attorney for the institution of judicial forfeiture proceedings while the administrative petition was pending." 689 F.2d at 859. The court held that, even though the claimant never objected to the delay, the waiver did not extend to the full 10 months during which the petition was pending, because due process requires the government to act promptly on petitions for remission. *Id.* at 860. Thus, in the Ninth Circuit, even when waiver is obtained, the government is still left to guess as to how long it can investigate before the court of appeals declares the delay unreasonable and terminates the right to forfeit the property.

6. Finally, claimant defends (Br. 49-50) the sanction of dismissal of the government's forfeiture action on the alternative grounds that dismissal is proper as a "bright line rule" and because "agents of the state" are the alleged violators of claimant's rights. Both of these arguments are frivolous. A bright line rule is useful only if it provides guidance to government officers in conducting their day-to-day activities. The sanction for a constitutional violation is wholly immaterial to that purpose. Indeed, the decision of the court of appeals, declaring after the fact that the delay was unreasonable for unstated reasons, has completely the opposite effect from a bright line rule.

Equally irrelevant to the issue of sanction is the fact that government agents allegedly violated claimant's rights. Government agents may violate a defendant's search and seizure rights, but dismissal of the indictment is nevertheless not a proper remedy. See *United States* v. *Blue*, 384 U.S. 251 (1966). Obviously, even when government agents violate the Constitution, the remedy must be tailored to the injury suffered, and, absent prejudice to the claimant's ability to defend against the forfeiture, dismissal is a wholly inappropriate sanction. See *United States* v. *Valenzuela-Bernal*, No. 81-450 (July 2, 1982), slip op. 16; *United States* v. *Morrison*, 449 U.S. 361 (1981); cf. *Carey* v. *Piphus*, 435 U.S. 247, 266-267 (1978).

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

JANUARY 1983

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Docket Sheet

NO. 81-1062-CFX	TITLE	United States, Petitioner v. Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency

DOCKETED	COURT
Dec. 7, 1981	United States Court of Appeals for the Ninth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondent:
Nov. 9, 1981	Application for an extension of time to file petition for writ of certiorari and order granting same until Dec. 11, 1981 by Rehnquist, Nov. 12, 1981.
Dec. 7, 1981	Petition for writ of certiorari filed. (Record filed).
Jan. 13, 1982	DISTRIBUTED. 2-19.
Jan. 29, 1982	Response requested.
March 2, 1982	Motion of respondent Mary Josephine Vasquez for leave to proceed in forma pauperis, and brief in opposition filed
March 3, 1982	DISTRIBUTED. 3-19.
March 16, 1982	Reply brief for the United States filed. (D).
March 22, 1982	The motion of respondent Mary Josephine Vasquez for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

May 6, 1982	Joint appendix filed.
May 6, 1982	Order extending time to file the petitioner's brief on the merits until June 5, 1982.
June 7, 1982	Order further extending time to file the petitioner's brief on the merits until June 19, 1982.
June 29, 1982	Brief for the United States filed.
July 12, 1982	Order extending time to file the respondent's brief on the merits until Aug. 23, 1982.
Aug. 20, 1982	Order extending further the time to file the respondent' brief on the merits until September 1, 1982.
Sept. 3, 1982	Brief of respondent Mary Josephine Vasquez filed.
Sept. 20, 1982	Application for leave to file respondent's brief on the merits in excess of page limitations, and order denying same by Rehnquist, J., 9/24/82.
Nov. 5, 1982	CIRCULATED.
Jan. 11, 1983	Reply brief for the U. S. filed. (D).
Jan. 18, 1983	ARGUED.